No. 400

J. L. WILKEY AND J. L. WILKEY AD
INC., a Corporation, Petitioners,

STATE OF
SMITH AND

PETITION
PRESS
SUPPO

INDEX

	Page
Affidavit of Service	64
Ala. Statute construed (Sec. 42 (d) Title 46 Code 1940)	13, 50
Argument—Equal protection of Laws	55
Argument—Due process of law	60
Brief in Support of Petition	52
Cases Cited:	
Allgeyer vs. State 165 U. S. 590; 41 S. Ct. 832	15
Birmingham Bar Ass'n vs. Phillips & Marsh, 239 Ala. 650; 196 So. 725	53
Hartford Steam Boiler Insp. & Ins. Co. vs. Harrison 301 U. S. 459; 57 S. Ct. 838	15
New State Ice Co. vs. Leibman 285 U. S. 262; 52 S. Ct. 371; 76 L. Ed. 747	15
State of Okla. vs. Reidell 109 Okla. 35; 233 Pac. 684; 42 A. L. R. 765	
Wilkey vs. State 238 Ala. 121; 189 So. 198	2
Wilkey vs. State 238 Ala. 595; 192 So. 588; 129 A. L. R. 549	3
Wilkey vs. State 14 So. (2nd) 536	3
Decision of the Supreme Court of Alabama (abstracted)	14
Jurisdiction of the Supreme Court, Brief	53
Jurisdiction of the Supreme Court, petition	2
Opinion of Supreme Court of Ala. in case at bar—at length	19
Opinions on previous appeals of case at bar—citations	52
Reasons relied upon for allowance of writ	15
Specifications of Error, Brief	54
Specifications of Error, Petition	15
Statement of Facts	6
Statute construed, (Sec. 42 (d) Title 46 Code of Ala. 1940)	13, 50
Summary Statement of the matter involved	2

IN THE

SUPREME COURT OF THE UNITED States

October Term, 1943

No......

J. L. WILKEY AND J. L. WILKEY, ADJUSTER, INC., a Corporation, *Petitioners*,

vs.

STATE OF ALABAMA EX REL., JIM C SMITH AND JIM C. SMITH, *Respondents*

6th Div. 970

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petitions of J. L. Wilkey and J. L. Wilkey, Adjuster, Inc., separately and severally respectfully show to this Honorable Court:

A.
SUMMARY STATEMENT OF THE MATTER INVOLVED

The jurisdiction of this Court in invoked under Section 237 (a) of the Judicial Code as amended (U.S.C.A. Title 28 Section 344 (b).

This suit originated as a statutory quo warranto proceedings on the law side of the Circuit Court for the Tenth Judicial Circuit of the State of Alabama at Birmingham. (R. pp 4 and 13)

It was brought by the then President of the Birmingham Bar Association for the declared purpose of protecting the law practice from intrusion by unlicensed and unqualified persons (R. 4)

The respondents, petitioners here, were and for many years had been carrying on their business of Independent Insurance Adjusters in the City of Birmingham and adjacent territory.

The proceeding was filed on August 21, 1937. It was triable before a judge and jury.

At the first trial, the trial Court gave affirmative instructions for the complainants below and entered an order of exclusion against the respondents below (petitioners here). This judgment was reversed by the Supreme Court of Alabama (*Wilkey vs. State,* 238 Ala. 121; 189 So. 198).

The case was tried a second time and again the trial Court gave affirmative instructions for the complainants below and entered an order of exclusion against respondents below (petitioners here). This judgment was reversed by the Supreme Court of

Alabama, (*Wilkey v. State,* 238 Ala. 595; 192 So. 588; 129 A.L.R. 549).

On the third and last trial of the case the trial Court again gave affirmative instructions for the complainants below and entered an order of exclusion against the respondents below (petitioners here) (R. 32).

On appeal, the Supreme Court of Alabama affirmed this judgment in an opinion handed down on May 13, 1943 (R. 274). Respondents below (petitioners here) duly filed an application for rehearing on May 26, 1943 (R. 305) which was duly considered by the Supreme Court of Alabama whereupon the said Court extended its former opinion and overruled said application for rehearing and entered a final judgment in the cause on the 30th day of June, 1943 (R. 305). These proceedings were had and done within the time allowed by the Rules of the Supreme Court of Alabama. (Supreme Court Rule 38, Appendix to Title 7, Code of Alabama of 1940, page 1018.)

This opinion and extension thereof complained of are reported and are now available: *Wilkey v. State, ex rel., Smith*, 14 So. (2d) 536. They are inserted as "A" in the Appendix to this petition.

The opinion of the Supreme Court of Alabama turned upon its construction of a statute of Alabama cited as Section 42 Title 46 Code of Alabama 1940 and the validity of which being involved in this proceedings, is inserted as "B" in the Appendix to this petition.

The relief sought in the original petition filed

by complainants below was: (1) That the respondents be commanded to show by what warrant or authority they, separately and severally, are and have been intruding into the profession and practicing said profession of law in Birmingham, Jefferson County, Alabama, and elsewhere in the State: (2) that upon final hearing the respondents separately and severally be excluded or be prohibited from practicing law in this State until such time when they or either of them may become legally licensed to practice law in the State of Alabama.

The respondents below set up the general issue or denial of the allegations of the petition. Throughout each of three trials in the Circuit Court and in each of the three arguments made and briefs filed on appeal in the Supreme Court, petitioners have insisted that to give Section 42 Title 46 Code of Alabama of 1940 the meaning insisted upon by complainants below and now in part given to it by Supreme Court of Alabama would deprive petitioners of their property and freedom without due process of law and deny them the equal protection of the laws. That question was always before the Court and was decided contrary to petitioners insistence as seen by the Court's reference to petitioners' position in its opinion. (See last paragraph, Recod p. 294.)

The judgment rendered by the Court below is in substance as follows (using the Supreme Court's summary):

"* * * * * And it further appearing to the Court that plaintiffs are entitled to such appropriate relief as is germane to the general nature and purposes

of this proceeding in the proper administration of justice and for the general welfare of this State:

"Now, therefore, it is ordered, adjudged and decreed by the Court that the said defendants, J. L. Wilkey and J. L. Wilkey, Inc., a corporation, are now and have been continuously since, to wit: In January, 1932, unlawfully intruding into the profession of the practice of law in Jefferson County, Alabama, and elsewhere in this State, and unlawfully practice law in Jefferson County, Alabama, and elsewhere in this State, including the settling, adjusting or compromising of controverted or disputed claims or demands between persons with neither of whom they are in privity or in the relation of employer and employee in the ordinary sense, which is a profession requiring a license or certificate, or other legal authorization within this State, without having obtained such license or certificate or other legal authorization within this State.

"It is further ordered and adjudged by the Court that the defendants, J. L. Wilkey, Inc., a corporation, their officers, agents, servants or employees, be and they are each, separately and severally, hereby excluded from and prohibited from practicing law in the State of Alabama, including the settling, adjusting or compromising of controverted or disputed claims or demands between persons with neither of whom they are in privity or in the relation of employer and employee in the ordinary sense, until such time when they or either of them, respectively may become licensed to practice law in the State of Alabama" (R. 276).

In its last opinion, in a fair manner, the Supreme Court of Alabama made a summary of the facts, which in such part as we deem material to this petition, we, for convenience, adopt as our statement of facts, viz:

(Quoting from opinion in 14 So. (2d) 536): "A" in Appendix hereto).

> "The facts as are necessary to an understanding of this controversery may be summarized as follows:
>
> 'J. L. Wilkey is a resident of the City of Birmingham. His business or vocation is that of an independent insurance adjuster of claims for various companies. He has been so engaged in such vocation since 1928. This type of work was carried on by him as an individual until 1932, when J. L. Wilkey, Adjuster, Inc., a corporation, was organized. Wilkey is the owner of twenty-three of the twenty-five shares of stock, is president and treasurer of the corporation and has exercised complete control and supervision over its activities and policies. The objects for which the corporation was formed as here pertinent are stated in the incorporation declaration to be: (a) To engage in the business of enforcing, securing, settling, adjusting and compromising defaulted, controverted, disputed and denied accounts, claims or demands of every kind, acting solely for persons, firms and corporations with whom said J. L. Wilkey, Adjuster, Inc., is in privity, one or both, or more, or with whom one or both or more said J. L. Wilkey, Adjuster, Inc., sustains the legal relation of employer and employee in the ordinary sense; (b) the corporation shall have no power to practice

law nor act as an attorney. Offices are maintained in the cities of Birmingham, Anniston and Decatur. Neither Wilkey nor anyone else connected with the corporation at the time this case was tried below is licensed to engage in the practice of law in this State, although formerly one of the adjusters was so licensed.

For a number of years the respondent J. L. Wilkey, Adjuster, Inc., has advertised in insurance periodicals as being engaged in the business of investigating and adjusting claims made against insurance companies. The respondents have adjusted many claims made against numerous insurance companies and their assureds. They have not represented claimants trying to collect from insurance companies or individuals. Respondents are not paid a salary by any of the insurance companies which they represent, but are compensated for their services on an hourly and mileage basis. The offices are maintained at the expense of the corporation respondent. All clerical help and employees are employed by the said corporation and the respondent Wilkey is paid a salary by the respondent corporation for his services. Respondents have paid for a number of years the license required by both the State of Alabama and the City of Birmingham for engaging in the business of an insurance adjuster. Prior to the time that this suit was instituted respondents followed the practice of appearing as agents for insuranre companies in having consent judgments entered against such companies where suit was brought by next friend in behalf of minors. This practice, however, does not appear to have been followed by respondents since 1936 and they expressly disavowed any intention of resuming such practice.

The evidence shows that respondents rendered services to insurance companies in connection with the following types of claims: Workmen's compensation cases; fire losses; automobile collision (where claim was filed by insured for damage or injury to his automobile as result of collision); automobile liability insurance (where claim was filed by third person based on personal injury or damage to automobile as result of alleged negligence of company's assured). * * * * *

As we interpret the testimony, the procedure and practice usually followed by respondents in investigating, adjusting and settling claims, may be summarized as follows:

(a) Workmen's compensation claims. The respondents were usually notified of the fact that an employee had filed a claim by the local agent of the insurance company or by the employer covered by such insurance. Where the claim was based on minor injuries, the respondents did not make an investigation of the facts incident to the injury, but merely notified the insurance company of the fact that claims had been filed. If notified by the company that the claim should be paid, the respondents drew a draft on the company to cover the amount of the claim. In instances where there was any question as to whether the employee had actually been injured or if the employee had lost time from his job as a result of the injury, the respondents investigated the facts and made a report thereof to the insurance company. Payment was made to the injured employeee only upon express authorization or direction of the insurance company. * * * * *

(b) Fire insurance claims. Respondents in-

vestigated the facts incident to the fire losses when requested to do so by the companies and made reports of their findings to the company. Payments were made direct to the policy holder by the company, the respondents not being authorized to draw drafts on such companies.

(c) Automobile collision claims. Claims of this nature were usually forwarded to respondents by agents of insurance companies, but in some instances by the companies. After the claim was forwarded to respondents, they investigated the facts surrounding the accident and obtained from a reliable garage an estimate of the injury or damage to the automobile. This information was sent by respondents to the insurance companies, who usually determined the amount to be paid claimant after taking into consideration and deductible features which may have been included in the policy. * * * * *

(d) Liability insurance. Upon receiving notice from a company or its agent of an accident or injury, the respondents obtained as soon as possible complete information regarding the accident, including the nature and extent of any resulting injuries to persons and damage to property. The information obtained by respondents was forwarded to the insurance companies on forms furnished by the companies. The forms when filled out usually contained information as to the name and address of the claimant, the place where the accident occurred, the time of the accident, the type of automobile involved, the name of the driver, name and address of injured person, extent of injuries, extent of damage to automobile, and other similar information. The report also usually contained the driver's version of the accident, including his

opinion as to its cause. The adjuster's sometimes agreed with the injured party as to the amount of damages, after securing estimate from physician in case of personal injuries and from a garage in case of injuries to an automobile. In some instances respondents drew drafts on the companies for the amount agreed upon and in others they merely delivered to the payee the check sent to them by the company. In a few instances drafts were drawn by the respondents on the insurance company in payment of claims without being specifically directed to do so by the insurance company. In such cases the amount of the claim was small. When a claim was paid, the respondents had the claimant execute a release. The releases were not drawn by respondents but were furnished by the insurance companies. Each insurance company had a different form of release but in most instances they varied only in minor details. Most of the companies used the same form of release for all types of claims, but at least one had different forms for different claims. Respondents selected from the release forms sent to them the one which in their judgment was applicable to the particular type of claims. The form generally used merely called for the insertion therein of the date and place of the accident and the name of the person who receives the check or draft. Where the claimant did not agree to accept the amount offered by the insurance company, the respondents made additional investigation and reported the results thereof to the companies. If the company did not recede from its original stand after the receipt of the additional information, respondents so notified the claimants. In cases where suit resulted, the company and its

local counsel were notified by respondents, who forwarded to local counsel the entire file. The respondents after forwarding the file to the company's local counsel were no longer connected with the matter. * * * * *

There appear to be three types of insurance adjusters, the "claimant adjuster", the "salaried adjuster", and the "independent adjuster".

The "claimant adjuster" is one who, while he may do the things the appellants do, will also obtain, secure, enforce, or establish a right, claim or demand for an individual against an insurance company. That is, he collects as well as pays. His activity is not as an incident of a legitimate business like insurance, but as an independent vocation. He holds himself out to the public as ready to serve all comers. The authorities are practically unanimous in holding that the method of operation of this type of insurance adjuster constitutes the practice of law. One of the leading cases dealing with this type of adjuster is that of *Meunier v. Bernich,* La. App., 170 So. 567, wherein it appears that Meunier, the adjuster, undertook not only to investigate the facts and negotiate for a settlement, but he also advised claimants as to the liability of the tort feasor and advised them respecting their rights and liabilities as a matter of law. Meunier also by contract reserved the right to place the claims in the hands of a lawyer of his own choosing in event suit was necessary. This course of procedure seems to have been that followed by the adjuster in all of the cases dealing with this type of adjuster. *Fitchette v. Taylor,* 191 Minn. 582, 254 N. W. 910; 94 A. L. R. 356; *Fink et al v. Peden,* 214 Ind. 584, 17

N. E. 2d. 95; *Hightower v. Detroit Edison Co.*, 262 Mich. 1, 247 N.W. 97, 86 A.L.R. 509.

The "salaried adjuster" is one who performs the same type of service as do the appellants in this case, but is a full time employee of one insurance company or of two or more separate companies who operate together as a so-called "group", all contributing pro rata to his salary. Only one case has been called to our attention wherein a Court has been called upon to pass upon the question as to whether or not this type of insurance adjuster in performing the usual functions of such an adjuster is engaged in the practice of law. In *Liberty Mutual Insurance Co., et al., v. Jones, et al.*, 344 Mo. 932, 130 S. W. 2d 945; 125 A.L.R. 1149, the Supreme Court of Missouri held that this type of adjuster was not engaged in the practice of law in investigating and reporting facts, and negotiating settlements for his employer.

The "independent insurance adjuster" differs very little in respect to the activities in which he engages from the salaried insurance adjuster. The two types differ only in their method of employment and the method of their payment. One is hired by one company or a number of companies acting as a "group" and is paid by the month, while the other is hired by several companies acting independently, and is paid by the hour and the mile. The Supreme Court of Wisconsin in the case of *State of Wisconsin v. Rice*, 236 Wis. 38, 294 N.W. 550, has held that an independent insurance adjuster is not engaged in the practice of law when investigating and reporting the facts incident to an automobile accident or in negotiating a settlement between the claimant and the insurance company. The

Wisconsin case, *supra,* is the only case from other jurisdictions which has been called to our attention wherein the status of an independent insurance adjuster is discussed.

The appellants, unquestionably, should be classed as "independent insurance adjusters, * * * * *" (R. pp. 278-284).

There have been omitted from the above copied statement of facts references to occasional acts of the respondents below, usually not habitually engaged in or now long since abandoned and in most instances conceded by all parties to constitute the practice of law and not now insisted upon as within their rights by petitioners (respondents below).

Subsection (d) of Section 42 Title 46 of the present Code of Alabama with sufficient context to make it intelligible, reads :(See "B" in Appendix hereto for complete Section.)

> *"Who may practice as attorneys.*—Only such persons as are regularly licensed have authority to practice law. For the purposes of this article, the practice of law is defined as follows: Whoever, * * * * * (d) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense is practicing law."

The Supreme Court of Alabama in its opinion, a revision of which is here sought, construed this state

statute to permit the "salaried insurance adjuster" as defined by the Court, to settle "defaulted, controverted or disputed" claims and to deny that right to the "independent insurance adjuster", which it held petitioners (respondents below) to be.

In this connection the Court said:

> "Before the situation reaches a point where there is a default, dispute or controversy, the law in our opinion provides for adjustment by independent lay adjusters, duly qualified and licensed as such, who may do whatever is necessary to that and not prohibited by subdivisions (a), (b) and (c) of Section 42 Title 46, *supra*. But after a default, dispute or controversy has arisen, the independent lay adjuster must step aside, for then the law declares that the further adjustment or litigation must be handled by a regularly licensed lawyer."

This language alone would leave it slightly uncertain whether the salaried adjuster would, when the claim became disputed or controverted, also have to "step aside" but on rehearing the Court clarified its language by saying further with reference to said subsection (d):

> "That section provides that one who adjusts a defaulted, controverted or disputed account, claim or demand between persons with either of whom he is in privity or with whom he stands in the relation of employer and employee in the ordinary sense, is not engaged in the practice of law."

The effect of this holding on application for rehearing is that one class of adjusters, viz, the "salaried adjuster" may settle defaulted, controverted or disputed accounts, claims or demands, while the other class, to which petitioners belong, viz, the "independent insurance adjuster" cannot do so.

The Court then said:

> "The appellants contend, however, that if such a construction be placed on the statute, it would deny to them the equal protection of the laws and, therefore, would be unconstitutional. We do not agree with that contention" (R. 294).

B.

Reasons Relied on For The Allowance of The Writ

A review of this cause on certiorari to the said Supreme Court of Alabama is sought for the following reasons:

(1) The Supreme Court of Alabama has decided a federal question of substance in a way not in accord with applicable decisions of this Court. (*Hart-Ford Steam Boiler Inspection and Insurance Company v. Harrison,* 301 U.S. 459; 57 S. Ct. 838; *Allgeyer v. State of Louisiana,* 165 U.S. 590; 41 S. Ct. 832; *New State Ice Company v. Leibman,* 285 U.S 262; 52 S. Ct. 371; 76 L. Ed. 747.)

(2) The Supreme Court of Alabama has decided a federal question of substance in a way directly contrary to the principle of law established by this Court in the cases cited in (1) above.

(3) The Supreme Court of Alabama has so construed subdivision (d) Section 42 Title 46 Code of Alabama 1940 as to deny the equal protection of the laws to petitioners in violation of the Fourteenth Amendment of the Constitution of the United States.

(4) The Supreme Court of Alabama has so construed subdivision (d) Section 42 Title 46 Code of Alabama 1940 as to deprive petitioners of liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(5) The Supreme Court of Alabama has so construed subdivision (d) Section 42 Title 46 Code of Alabama 1940 as to make an arbitrary and unreasonable classification of petitioners and other independent insurance adjusters and under such classification to deny them equal protection of the laws as established by this Court in the case cited in (1) above.

(6) The Supreme Court of Alabama has so construed subdivision (d) Section 42 Title 46 Code of Alabama 1940 as to deprive petitioners and other independent insurance adjusters of liberty and property without due process of law as established by this Court in the decisions cited in (1) above.

(7) The Supreme Court of Alabama in the decision complained of has erroneously held subdivision (d) Section 42 Title 46 Code of Alabama 1940 as construed by said Court to be valid and constitutional.

(8) The decision of the Supreme Court of Alabama here complained of has the effect of authorizing one lay adjuster to settle controverted and dis-

puted insurance claims and to deny that right to another lay adjuster between whom there is no valid basis of distinction as defined in the cases cited in (1) above, all contrary to the Fourteenth Amendment to the Constitution of the United States.

(9) The Supreme Court of Alabama has erroneously and wrongfully denied to petetioners and other independent insurance adjusters the right to follow the vocation of settling and adjusting controverted and disputed insurance claims contrary to the rule established by this Court in the cases cited in (1) above and in violation of the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, your petitioners, separately and severally, respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Alabama, commanding that Court to certify and send to this Court for its review and determniation, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case on its docket numbered *Sixth Division 970* and entitled *J. L. Wilkey and J. L. Wilkey, Adjuster, Inc., a corporation, Appellants, v. State of Alabama, ex rel., Jim C. Smith, and Jim C. Smith, Appellees,* and that the said judgment and decree of the Supreme Court of Alabama may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to

this Honorable Court may seem meet and just, and your petitioners will ever pray.

J. L. WILKEY,
J. L. WILKEY, INC., a Corporation,

By J. L. Wilkey
J. L. Wilkey, Its President.

JAMES A. SIMPSON,
Counsel for the Petitioners.

Post Office Address of Counsel
for Petitioners:
1029 Frank Nelson Building,
Birmingham 3, Alabama.

APPENDIX "A"

STATE OF ALABAMA—
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1942-43

SIXTH DIVISION 970

J. L. WILKEY AND J. L. WILKEY, ADJUSTER, INC.,
a Corporation,

v.

STATE OF ALABAMA, EX REL JIM C. SMITH,
and JIM C. SMITH,

APPEAL FROM JEFFERSON CIRCUIT COURT

LAWSON, JUSTICE:

This is an appeal from a judgment rendered in the Court below wherein the appellants were adjudged guilty of practicing law without a license, as required by law, and wherein appellants were pro-

hibited from continuing the practice of law until regularly licensed to so practice in accordance with the laws of this State.

The original petition in this cause was filed on August 21, 1937, in the name of the State of Alabama on the relation of Jim C. Smith and Jim C. Smith against J. L. Wilkey and J. L. Wilkey, Adjuster, Inc., charging that the respondents were engaged in the practice of law without a license. To the original petition, as amended, the respondents filed numerous pleas, among them the general issue and a special plea wherein was set out the practice and procedure usually followed by the respondents in conducting the business of an insurance adjuster. The trial court sustained a demurrer to the plea of the general issue and also to the said special plea. This Court in the case of *Wilkey v. State,* 238 Ala. 121, 189 So. 198, reversed the trial court, holding that it erred in sustaining the demurrer to the plea of the general issue, but concluding that the demurrer to the special plea was correctly sustained. On the second trial in the Court below, the trial court gave the general affirmative charge for the complainant after the opening statement of the respondents' counsel. This Court again reversed and remanded the cause on the ground that where the respondents plead the general issue and do not waive jury trial, and the opening statement of their counsel raises no issue which is immaterial or against public policy, a directed verdict based on such opening statement is improper as denying the right to trial by jury—*Wilkey v. State,* 238 Ala. 595, 192 So. 588. The pres-

ent appeal, therefore, is the third in this case.

The relator alleged in the petition that he was a duly licensed practicing attorney, residing and practicing law in Birmingham, Jefferson County, Alabama, and that at the time of the filing of the petition was president of the Birmingham Bar Association.

The petition charges that J. L. Wilkey, Adjuster, Inc., a corporation, was organized on the 2nd day of January, 1932, in Jefferson County, Alabama, and has its principal office or place of business in said city of Birmingham, Jefferson County, Alabama, and that said corporation was still in existence and in operation at the time of the filing of the petition; that the respondent J. L. Wilkey, Adjuster, Inc., a corporation, from the time of its creation has been managed, controlled and practically owned by the individual respondent J. L. Wilkey; that J. L. Wilkey and J. L. Wilkey, Adjuster, Inc., a corporation, are intruding into the profession of the practice of the law in Jefferson County, Alabama, and elsewhere in this State in that they are and have been since 1932 unlawfully practicing law without having obtained the license as required by the laws of this State.

The relief sought in the petition is: (1) That the respondents be commanded to show by what warrant or authority they, separately and severally, are and have been intruding into the profession and practicing said profession of law in Birmingham, Jefferson County, Alabama, and elsewhere in the State; (2) that upon final hearing the respondents separately and severally be excluded or be prohibited from practicing law in this State until such time when

they or either of them may become legally licensed to practice law in the State of Alabama.

The respondents by pleas 1 and 2 set up the general issue or denial of the allegations of the petition.

After the completion of the testimony, the trial court gave the general affirmative charge with hypothesis for the complainant, which charge was duly requested in writing. The jury returned a verdict in accordance with said charge, in favor of the complainant and against the respondents.

The judgment rendered by the Court below is in substance as follows:

> "* * * And it further oppearing to the Court that plaintiffs are entitled to such appropriate relief as is germane to the general nature and purposes of this proceeding in the proper administration of justice and for the general welfare of this State:
>
> "Now, therefore, it is ordered, adjudged and decreed by the Court that the said defendants, J. L. Wilkey and J. L. Wilkey, Adjuster, Inc., a corporation, are now and have been continuously since, to wit: in January, 1932, unlawfully intruding into the profession of the practice of law in Jefferson County, Alabama, and elsewhere in this State, and unlawfully practice law in Jefferson County, Alabama, and elsewhere in this State, including the settling, adjusting or compromising of controverted or disputed claims or demands between persons with neither of whom they are in privity or in the relation of employer and employee in the ordinary sense, which is a profession requiring a license or certificate, or other legal authorization with-

in this State, without having obtained such license or certificate or other legal authorization within this State.

"It is further ordered and adjudged by the Court that the defendants, J. L. Wilkey, Inc., a corporation, their officers, agents, servants or employees, be and they are each, separately and severally hereby excluded from and prohibited from practicing law in the State of Alabama, including the settling adjusting or compromising of controverted or disputed claims or demands between persons with neither of whom they are in privity or in the relation of employer and employee in the ordinary sense, until such time when they or either of them, respectively may become licensed to practice law in the State of Alabama.

The primary purpose of this litigation as we view it is to have this Court determine whether or not there is a field of operation under the laws of this State for the independent insurance adjuster and, if so, to draw a line of demarcation between those acts which constitute the practice of law and those acts connected with the usual course of conduct of such a business which do not amount to the practice of law.

The petition or information in this case does not include any averments of specific acts on the part of respondents which it is contended constitute the practice of law. We have held that such is not necessary, but that allegations, such as are in this case, which charge in general terms that a respondent has intruded into the practice of the profession without a license as required by law, are sufficient.—*Donovan*

v. State ex rel. Biggs, 215 Ala. 55, 109 So. 290. The testimony tends to show the practice tnd procedure customarily followed by respondents in the conduct of business of an independent insurance adjuster. It includes many phases and several different activities which appellee contends constitute the practice of law. If it appers by direct, positive and undisputed evidence that respondents have engaged in any activities in the conduct of the business of an insurance adjuster which constitute the practice of law, then the trial court correctly gave the general affirmative charge with hypothesis, as requested by complainant, even though there may be conflict in the evidence as to some phases of respondents' activities or if certain of the other activities of respondents do not constitute the practice of law.

However, in the interest of clarity and because of the importance of the questions presented to all parties concerned, including the public, we deem it wise to discuss the various activities of respondents as disclosed by the record and to express our opinion as to whether or not they constitute the practice of law.

The facts as are necessary to an understanding of this controversy may be summarized as follows:

J. L. Wilkey is a resident of the City of Birmingham. His business or vocation is that of an independent insurance adjuster of claims for various companies. He has been so engaged in such vocation since 1928. This type of work was carried on by him as an individual until 1932, when J. L. Wilkey, Adjuster, Inc., a corporation, was organized. Wilkey is the owner of twenty-three of the twenty-five shares of

stock, is president and treasurer of the corporation and has exercised complete control and supervision over its activities and policies. The objects for which the corporation was formed as here pertinent are stated in the incorporation declaration to be: (a) To engage in the business of enforcing, securing, settling, adjusting and compromising defaulted, controverted, disputed and denied accounts, claims or demands of every kind, acting solely for persons, firms and corporations with whom said J. L. Wilkey, Adjuster, Inc., is in privity, one or both or more, or with whom one or both or more said J. L. Wilkey, Adjuster, Inc., sustains the legal relation of employer and employee in the ordinary sense; (b) The corporation shall have no power to practice law nor set as an attorney. Offices are maintained in the cities of Birmingham, Anniston and Decatur. Neither Wilkey nor anyone else connected with the corporation at the time this case was tried below is licensed to engage in the practice of law in this State, although formerly one of the adjusters was so licensed.

For a number of years the respondent J. L. Wilkey, Adjuster, Inc., has advertised in insurance periodicals as being engaged in the business of investigating and adjusting claims made against insurance companies. The respondents have adjusted many claims made against numerous insurance companies and their assureds. They have not represented claimants trying to collect from insurance companies or individuals. Respondents are not paid a salary by any of the insurance companies which they represent, but are compensated for their services on an hourly and

mileage basis. The offices are maintained at the expense of the corporation respondent. All clerical help and employees are employed by the said corporation and the respondent Wilkey is paid a salary by the respondent corporation for his services. Respondents have paid for a number of years the license required by both the State of Alabama and the City of Birmingham for engaging in the business of an insurance adjuster. Prior to the time that this suit was instituted respondents followed the practice of appearing as agents for insurance companies in having consent judgments entered against such companies where suit was brought by next friend in behalf of minors. This practice, however, does not appear to have been followed by respondents since 1936 and they expressly disavowed any intention of resuming such practice.

The evidence shows that respondents rendered services to insurance companies in connection with the following types of claims: workmen's compensation cases; fire losses; automobile collision (where claim was filed by insured for damage or injury to his automobile as result of collision; automobile liability insurance (where claim was filed by third person based on personal injury or damage to automobile as result of alleged negligence of company's assured).

The record is not in all respects clear as to the procedure and practice customarily followed by respondents in investigating, adjusting and settling claims. The scope of respondents' activity and authority seems to have depended on the type of claim

investigated and in some instances it is not clear as to which type of claim the evidence as to the procedure and practice employed by respondents related.

As we interpret the testimony, the procedure and practice usually followed by respondents in investigating, adjusting and settling claims, may be summarized as follows:

(a) Workmen's compensation claims. The respondents were usually notified of the fact that an employee had filed a claim by the local agent of the insurance company or by the employer covered by such insurance. Where the claim was based on minor injuries, the respondents did not make an investigation of the facts incident to the injury, but merely notified the insurance company of the fact that claims had been filed. If notified by the company that the claim should be paid, the respondents drew a draft on the company to cover the amount of the claim. In instances where there was any question as to whether the employee had actually been injured or if the employee had lost time from his job as a result of the injury, the respondents investigated the facts and made a report thereof to the insurance company. Payment was made to the injured employee only upon express authorization or direction of the insurance company. The record contains only one specific reference to a workmen's compensation claim handled by the respondents. In that instance it appears that respondents were local adjusters for the Standard Accident Insurance Company, which company carried a workmen's compensation policy on an employer at Birmingham. An employee named

Harris was injured, made claim against the Standard Accident Insurance Company for workmen's compensation benefits and was paid through respondents' office. When this compensation had been paid out in full, the said insurance company then wrote its attorneys at Birmingham to pick up the file from respondents' office and bring suit against the L. & N. R. R. Co., which company was alleged to have caused the injury, for reimbursement. Respondents delivered the file to the attorneys, who proceeded with the suit for reimbursement. The defendant railroad company called the respondent Wilkey as a witness. He testified on that trial that he had told the ijured party how many weeks his injury entitled him to be paid for and what his average weekly wages were. It does not appear, however, whether the information given by Wilkey to Harris was based on his own application of the law to the facts or whether such information was furnished Wilkey by the insurance company.

(b) Fire insurance claims. Respondents investigated the facts incident to the fire losses when requested to do so by the companies and made reports of their findings to the company. Payments were made direct to the policy holder by the company, the respondents not being authorized to draw drafts on such companies.

(c) Automobile collision claims. Claims of this nature were usually forwarded to respondents by agents of insurance companies, but in some instances by the companies. After the claim was forwarded to respondents, they investigated the facts surrounding

the accident and obtained from a reliable garage an estimate of the injury or damage to the automobile. This information was sent by respondents to the insurance companies, who usualy determined the amount to be paid claimant after taking into consideration any deductible features which may have been included in the policy. It appears, however, that in at least one instance the respondents determined the amount of the payment after taking into consideration the deductible features in the contract of insurance. In some instances respondents notified insurance companies and individuals as to their subrogation rights and had claimants execute lien subrogation papers. Payment was made to claimant by the insurance company.

(d) Liability insurance. Upon receiving notice from a company or its agents of an accident or injury, the respondents obtained as soon as possible complete information regarding the accident, including the nature and extent of any resulting injuries to persons and damage to property. The information obtained by respondents was forwarded to the insurance companies on forms furnished by the companies. The forms when filled out usually contained information as to the name and address of the claimant, the place where the accident occurred, the time of the accident, the type of automobile involved, the name of the driver, name and address of injured person, extent of injuries, extent of damage to automobile, and other similar information. The report also usually contained the driver's version of the accident, including his opinion as to its cause. The ad-

justers sometimes agreed with the injured party as to the amount of damages, after securing estimate from physician in case of personal injuries and from a garage in case of injuries to an automobile. In some instances respondents drew drafts on the companies for the amount agreed upon and in others they merely delivered to the payee the check sent to them by the company. In a few instances drafts were drawn by the respondents on the insurance company in payment of claims without being specifically directed to do so by the insurance company. In such cases the amount of the claim was small. When a claim was paid, the respondents had the claimant execute a release. The releases were not drawn by respondents but were furnished by the insurance companies. Each insurance company had a different form of release but in most instances they varied only in minor details. Most of the companies used the same form of release for all types of claims, but at least one had different forms for different claims. Respondents selected from the release forms sent to them the one which in their judgment was applicable to the particular type of claims. The form generally used merely called for the insertion therein of the date and place of the accident and the name of the person who receives the check or draft. Where the claimant did not agree to accept the amount offered by the insurance company, the respondents made additional investigation and reported the results thereof to the companies. If the company did not recede from its original stand after the receipt of the additional information, respondents so notified the claimants. In

cases where suit resulted, the company and its local counsel were notified by respondents, who forwarded to local counsel the entire file. The respondents after forwarding the file to the company's local counsel were no longer connected with the matter.

On one occasion it appears that respondents, after the claimant had refused the amount offered him, recommended to the insurance company that the payment be increased. In connection with this same matter the respondent Wilkey advised the claimant that he could not enter suit on behalf of his wife to recover for the losses sustained by her as a result of her absence from work while caring for claimant.

On another occasion after the claimant refused to accept the amount offered, the respondents continued to handle the matter and finally drew a draft on the insurance company for an increased amount in accordance with the company's authorization.

There appear to be three types of insurance adjusters, the "claimant adjuster", the "salaried adjuster", and the "independent adjuster".

The "claimant adjuster" is one who, while he may do the things the appellants do, will also obtain, secure, enforce, or establish a right, claim or demand for an individual against an insurance company. That is, he collects as well as pays. His activity is not as an incident of a ligitimate business like insurance, but as an independent vocation. He holds himself out to the public as ready to serve all comers. The authorities are practically unanimous in holding that the method of operation of this type of insurance adjuster constitutes the practice of law. One of the

leading cases dealing with this type of adjuster is that of *Meunier v. Bernich,* 170 So. 567, (La.), wherein it appears that Meunier, the adjuster, ,undertook not only to investigate the facts and negotiate for a settlement, but he also advised claimants as to the liability of the tort feasor and advised them respecting their rights and liabilities as a matter of law. Meunier also by contract reserved the right to place the claims in the hands of a lawyer of his own choosing in event suit was necessary. This course of procedure seems to have been that followed by the adjuster in all of the cases dealing with this type of adjuster.—*Fitchett v. Taylor,* 191 Minn. 582, 254 N. W. 910; *Fink et al. v. Peden,* 214 Ind. 584, 17 N. E. 2d 95; *Hightower v. Detroit Edison Co.,* 262 Mich. 1, 247 N. WW. 97.

The "salaried adjuster" is one who performs the same type of service as do the appellants in this case, but is a full time employee of one insurance company or of two or more separate companies writing different lines of insurance, but who operate together as a so-called "group", all contributing pro rata to his salary. Only one case has been called to our attention wherein a Court has been called upon to pass upon the question as to whether or not this type of insurance adjuster in performing the usual functions of such an adjuster is engaged in the practice of law. In *Liberty Mutual Insurance Co., et al., v. Jones, et al.,* 344 Mo. 932, 130 S. W. 2d 945, the Supreme Court of Missouri held that this type of adjuster was not engaged in the practice of law in investigating

and reporting facts, and negotiating settlements for his employer.

The "independent insurance adjuster" differs very little in respect to the activities in which he engages from the salaried insurance adjuster. The two types differ only in their method of employment and the method of their payment. One is hired by one company or a number of companies acting as a "group" and is paid by the month, while the other is hired by several companies acting independently, and is paid by the hour and the mile. The Supreme Court of Wisconsin in the case of *State of Wisconsin v. Rice*, 236 Wis. 38, 294 N. W. 550, has held that an independent insurance adjuster is not engaged in the practice of the law when investigating and reporting the facts incident to an automobile accident or in negotiating a settlement between the claimant and the insurance company. The Wisconsin case, *supra*, is the only case from other jurisdictions which has been called to our attention wherein the status of an independent insurance adjuster is discussed.

The appellants, unquestionably, should be classed as "independent insurance adjusters", but the decision here cannot be predicated in all of its phases on the Wisconsin case, *supra*, for the reason that our statute defining the practice of law is in most respects different from the Wisconsin statute relating thereto.

In 1927 the legislature attempted to amend Section 6248 of the Code of 1923 so as to define the practice of law in this State. This act of the legislature (Act No. 575, H. 490, approved September 7, 1927, General Acts 1927, page 669) was held to be unconstitu-

tional as violative of Section 45 of the Constitution in the case of *Kendrick v. State,* 218 Ala. 277, 120 So. 142.

In 1931 the legislature reenacted the 1927 act *en haec verba* (Act No. 493, H. 606, approved July 20, 1931 (General Acts 1931, page 606). This latter act was held constitutional in the case of *Berk v. State ex rel Thompson,* 225 Ala. 324, 142 So. 832, 84 A.L.R. 740, from which case we quote as follows:

> "It is well established that the act in question (General Acts 1931, F. 606) is a valid enactment under the police power, and offends neither state nor Federal Constitution; is not usurpation of judicial power; does not deprive of liberty or property without due process; neither denies to citizens equal civil rights, nor grants special privileges and immunities; does not violate, impair, or deny rights retained by the people, and does not violate the Fourteenth Amendment to the Federal Constitution."

The 1931 act, *supra,* has now been codified as Section 42 of Title 46, Code of 1940, and is as follows:

> "Who may practice as attorneys.—Only such persons as are regularly licensed have authority to prectice law. For the purposes of this article, the practice of law is defined as follows: Whoever, (a) in a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending any act in connection with proceedings pending or prospective before a Court or a justice of the peace, or a body, board,

committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the State or any subdivision thereof; or, (b) for a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or, (c) for a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf or another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or (d) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense is practicing law. Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing adstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon. Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this article to be an act of practicing law, is guilty of a misdemeanor, and on conviction must be punished as provided by law. And any person, firm or corporation who conspires with, or aids and abets, another person, firm or corporation in the commission of such mis-

demeanor must, on conviction, be punished as provided by law."

We will first treat the question as to whether or not the practice and procedure which the record shows the respondents to have followed in adjusting and negotiating settlements for the insurance companies represented by them constitutes the practice of law when done by an independent insurance adjuster, such as respondents, within the meaning of subdivision (d) of Section 42, Title 46, *supra.*

Appellee strenuously insists that it was definitely determined by this Court on a former appeal in this case (*Wilkey v. State,* 238 Ala. 121, 189 So. 198) that such activity by appellants is forbidden by subdivision (d) of Section 42, Title 46, *supra.* In that case Mr. Chief Justice Anderson, writing for the Court, held that the trial court correctly sustained a demurrer to a special plea filed by respondents wherein was set out the practice and procedure customarily followed by the respondents in the conduct of the business of an insurance adjuster. It was held that the facts alleged in the said special plea showed that appellants were not employees of the insurance companies which they represented "in the ordinary sense" nor in privity with the insurance companies and liability carriers, and, therefore, the activity in which appellants were engaged controvened the statute defining the practice of law.

The special plea which this Court treated on a former appeal in this case, and which we held to show that respondents were engaged in the practice of law, was as follows:

"The defendants, and each of them, are employed by several casualty and fire insurance companies and liability carriers and in this employment when one of the said companies by itself or its representative, advises the defendants that an accident or fire has occurred which involves an assured of such company, the defendants, in behalf and on request of such companies, investigate such accident or fire loss by interviewing witnesses and by taking down in writing statements of said witnesses, by having the physical damages to the person or property of the parties to such accident or fire reported on by physicians or repair men, as the case may be, in order to determine the severity of physical injuries or extent of property damage sustained by the parties involved, from such accidents or fire, which facts are reported by defendants to their said employers and, in those cases where the employers so direct, these defendants endeavor to settle such claims for physical injury or property damage sustained by such parties from such accident or fire by payment of a sum satisfactory to such injured or damaged party or parties, and to the said employers of these defendants; and in all such cases where such settlement cannot be made, then these defendants refer to the legal representatives of their said employers the said facts, statements of witnesses and other information developed by these defendants on such investigation, to be handled by such legal representatives. These defendants further say that the above are the only acts done or business in which these defendants are now engaged or propose to engage in future, and that all of the acts and things so done by these defendants, as above detailed, are all done under the orders and su-

perintendence of the legal department of defendants said employers. These defendants further say that they do not represent plaintiffs or individual claimants, nor seek to do so, but are only employed by companies against which claims are made or may be made growing out of or incident to an accident or fire, as aforesaid.

"The type or kind of business done and the method of conducting their business as herein set out is not only the type, method, manner and course of business employed or engaged in by the defendants and each of them at the time of the institution of this suit, and for a long time, towit more than a year, prior thereto, but is the only type, method, manner and course of business or activity engaged in by defendants or either of them since the filing of this complaint or that they propose or claim the right to engage in at any time in the future. They further aver that during the times herein before stated they and neither of them are employed by or act for any other person, firm or corporation in any capacity whatsoever, except said insurance companies above described and that they bear the relation of employee to employer in the ordinary sense as well as the legal sense to each of said insurance companies. The business engaged in by the defendants is known as 'insurance adjuster' and as such is provided for by the revenue laws of the State of Alabama and by the License laws of the City of Birmingham, and the defendants have duly and legally paid to the State of Alabama, the County of Jefferson and the City of Birmingham their licenses to transact the said business carried on by them for the year of 1932 and many years prior thereto and for each year since the year 1932. The defendants are not now,

have not within the time hereinbefore stated, and do not claim the right to nor propose in the future to engage in or intrude into the practice of the profession of law in Jefferson County or in the State of Alabama or elsewhere."

The course of conduct of respondents' business as an insurance adjuster as set out in said plea is in some material respects the same as that shown by the undisputed proof in this case in so far as it relates to respondents' activities in connection with the settlement, negotiation or adjustment of claims.

We are not here controlled by the decision on the former appeal, in fact we are required by statute to review the case anew without regard to the former decision, but we do not consider the conclusion reached in the former opinion to be in conflict with the view now entertained.—Section 28, Title 13, Code of 1940; *Birmingham News Co. v. Birmingham Printing Co.*, 213 Ala. 256, 104 So. 506; *Mann v. Darden*, 171 Ala. 142, 54 So. 504.

We agree with the conclusion there reached that the appellants were not employees of the insurance companies which they represented "in the ordinary sense" nor in privity with such companies and liability carriers.

We do not construe the former opinion as holding that all of the activities of respondents as detailed in the said special plea constituted the practice of law. The Court on that appeal was passing on a demurrer to the special plea in bar of the charge against respondents. When so, the plea is construed most strong-

ly against the pleader on the assumption that he has stated his defense in the light most favorable to him on the facts. The plea does not allege whether the claims which appellants had been adjusting or settling were "defaulted, controverted or disputed". It must be assumed, therefore, that at least some of them were probably so classed. If so, respondetns' conduct in adjusting and settling them was practicing law under subdivision (d), *supra*. That was probably what the Court meant in holding that the plea does not show that he was not engaged in conduct declared by that statute as practicing law.

Section 42, Title 46, *supra*, requires a license to authorize one to practice law and then defines what constitutes the practice of law.

To obtain a license to practice law, one must either be a graduate of the Law Department of the University of Alabama, or be approved by the Board of Examiners appointed by the Board of Commissioners of the State Bar (Sections 25, 26 and 27, Title 46, Code of 1940).

The legislature of this State, as early as 1897, recognized the fact that the adjustment of losses was an integral part of the insurance business (Act No. 614, S. 295, approved February 18, 1897, General Acts 1897, page 1377). To like effect are the provisions of Sections 79, 80 and 81 of Title 28, Code of 1940.

An insurance agent includes one who "examines or adjusts or aids in adjusting any loss for or on behalf of any insurance company". (Section 79, Title 28, *supra*). No person shall engage in such business as

an adjuster until he shall have complied with the laws governing insurance agents and procured a license as required by law. To procure such a license he must have the qualifications prescribed. (Sections 80 and 81, Title 28, *supra*). An insurance adjuster (agent) before securing a license must submit to the Superintendent of Insurance evidence tending to show that he has had experience or will be instructed as to the insurance business, is possessed of good reputation and has knowledge of the fundamental principles of insurance, insurance business, practices, policy and contract classifications. The State Superintendent of Insurance must be satisfied also that he is "generally familiar with the provisions of the law of this State relating to insurance".

The legislature by the passage of the act defining the practice of law did not, in our opinion, intend to completely prevent the adjustment of insurance losses by independent lay adjusters. There is a field of operation for the statutes relating to the practice of law distinct from that relating to the independent lay adjuster.

Subdivision (d) of Section 42, Title 46, *supra,* is not confined to insurance disputes but is broad enough to include them and should be so interpreted. But as its language imports, it does not include the adjustment of insurance losses before there is a default, dispute or controversy. Before the situation reaches a point where there is a default, dispute or controversy, the law in our opinion provides for adjustments *by independent* lay adjusters, duly qualified and licensed as such, who may do whatever is necessary to that

end not prohibited by subdivisions (a), (b) and (c) of Section 42, Title 46, *supra*. (But after a default, dispute or controversy has arisen, the *independent* lay adjuster must step aside, for then the law declares that the further adjustment or litigation must be handled by a regularly licensed lawyer.)

The qualifications which a lay insurance adjuster must possess before the State Superintendent of Insurance may issue him a license are sufficient protection both to the claimant and the insurance carrier until a default or controversy arises. Such an adjuster must be familiar with the insurance laws of this State, but not with the wide range of legal learning required of a lawyer necessary to handling any sort of claim or default which is controverted. Before that time arrives, the service of the lay insurance adjuster relates to inquiries of a factual sort alone; such as the causes of fires and accidents and the extent of the loss and negotiations and agreements concerning the same, including securing the execution of a written release. When a dispute arises, it may take a wide range in the realm of the law and be governed by legal principles of a general sort, or it may be easily solved. And so may any disputed controversy. But the law cannot separate and classify those which are disputed, controverted or defaulted into classes, some of which require the legal learning of a lawyer and some do not.

(We think it may well be assumed that there are many negotiations and inquiries after a loss by and between insured and the company for *which independent lay adjusters are well qualified to perform.*

That is their specialized field of activity in which they have been found to be duly qualified to serve. *The lawyer must come* into an adjustment as soon as a controversy or *dispute arises* or a default occurs. Any sort of controversy or dispute is the statutory line of demarcation.)

We must determine, therefore, as to whether or not the facts in this case show that the appellants have been engaged in enforcing, securing, settling, adjusting or compromising *defaulted, controverted* or *disputed* accounts, claims or demands, as distinguished from claims or demands which have not reached the stage of a default, controversy or dispute.

We are of the opinion that the activity of respondents in investigating and reporting the facts and circumstances relating to a claim filed against an insurance company represented by them was not in contravention of subdivision (d) of Section 42, Title 46, *supra*, and does not constitute the practice of law. We think that lay insurance adjusters may investigate and report such facts, may take photographs, secure statements from witnesses, secure estimates from physicians as to personal injuries and from experts as to the extent of damage to property and report the same to the insurance companies.

We find that the conduct of appellants in occasionally adjusting a collision loss where liability is not controverted did not constitute the practice of law, even though it was necessary for appellants to take into consideration the plain, unambiguous deductible features of the policy.

We see no impropriety in an insurance company

authorizing an *independent lay adjuster* to settle small claims or claims generally regarded by insurance companies as uneconomical to contest, without the specific approval of the company's counsel or its local attorney. If an insurance company, in the interest of economical management, deems it wise to inaugurate and maintain such a policy relative to small claims, we do not consider that the practice of law is involved in such settlements.—*Wisconsin v. Rice, supra.*

The evidence shows that on one or more occasions the appellants, in accordance with instructions received from the insurance company notified the claimant of the amount which the company agreed to pay on the settlement of the claim and after the refusal by the claimant to accept this sum, notified the company of the claimant's refusal and thereafter negotiated a settlement with claimant at an increased figure. As we construe the evidence, there was no dispute or controversy relative to liability, nor had the situation reached the point where negotiations were no longer possible. This conduct on the part of appellants did not constitute the practice of law within the meaning of the statute.

We conclude that the appellants in holding themselves out as being engaged in the business of independent insurance adjuster and listing the business in the classified section of insurance and adjustment journals, did not engage in the practice of law.

It is our judgment that the appellants were not engaged in the practice of law in having claimants execute releases on forms furnished appellants by

the insurance companies or by their counsel, even though the appellants selected from the forms furnished them the proper form applicable to the settled claim. We do not mean to be understood as holding, however, that an independent lay adjuster may prepare contracts or agreements for the settlement or compromising the claims made against the insurance companies employing him.—*Wisconsin v. Rice, supra.*

An *independent lay insurance* adjuster may not advise or recommend that insurance companies have subrogation or contribution claims against other insurance companies or individuals, as such action involves the giving of legal advice and constitutes the practice of law. The evidence shows that one Robinson and one Kelly were involved in an automobile collision. Robinson was covered by collision insurance carried by the Home Insurance Company, represented by appellants. The Home Insurance Company paid the claim filed by Robinson, whereupon respondents notified Kelly and his counsel or counsel for his insurance carrier that the Home Insurance Company had paid the claim and were holding subrogation rights and advised that any settlement made should subrogate the equity of the Home Insurance Company on account of their expenditure. We think this section on the part of appellants constituted the practice of law.

The evidence as to respondents' activities in connection with workmen's compensation claims is not in all respects clear. We do not think it sufficient to authorize us to say that it constituted the practice of

law. We think it advisable, however, to say that an independent lay insurance adjuster may not express his own opinion to a claimant as to the rights of the claimant under the workmen's compensation act, for such would require a construction of the law on the subject and would constitute the practice of law. However, we do not think that an independent lay adjuster is precluded from conveying to the claimant the legal opinion of counsel for the insurance company as to claimant's rights.

We are also of the opinion that the action of appellants in advising or recommending to an insurance company that the company increase the amount offered the claimant involved the giving of advice and, in our opinion, constituted the practice of law, since the evidence does not show that such recommendation was limited to appellants' estimate of the amount of the loss.

The action of respondents in advising a claimant that he could not legally enter suit against the insurance company which they represented to recover for the loss of earnings suffered by claimant's wife while caring for claimant after he was injured was, in our opinion, clearly in violation of subdivision (b) of Section 42, Title 46, *supra*. Such action on the part of appellants constituted the practice of law in that counsel or advice was given by appellants as to legal rights of the claimant.

We conclude that the appearance by the appellants before the Courts for the purpose of having settlements with minors approved by the Court constituted the practice of law. Such activity on the part of

the appellants conflicts with the provisions of subdivision (a) of Section 42 of Title 46, *supra*. Even if we had no such statute we would be constrained to hold that such activity amounted to the practice of law. However, there is no evidence in the record which shows that the respondents have followed this practice since the filing of the instant case. In fact, the evidence is clear on the point that such practice has long since been abandoned by the appellant.

Inasmuch as we have concluded that the evidence is clear to the point that some of the activities in which the appellants have been engaged constitute the practice of the law, the conclusion of the lower Court must be affirmed.

We are of the opinion that the complainants were entitled to the general affirmative charge with hypothesis as given by the Court below for the reason that the direct and undisputed testimony shows that some of the activities in which the respondents were engaged constituted the practice of the law.

The judgment is affirmed.

Affirmed.

All the Justices concur.

On Rehearing

LAWSON, JUSTICE:

On rehearing, appellants insist that we specifically point out whether or not the limitations which in the original opinion are placed on an independent insurance adjuster as to his activities in enforcing, securing, settling, adjusting or compromising de-

faulted, controverted or disputed accounts, claims or demands are likewise applicable to salaried adjusters. We were not dealing with the activities of the so-called salaried adjuster group in the original opinion and, therefore, did not expressly apply the provisions of subdivision (d) of Section 42, Title 46, *supra,* to their activities. Subdivision (d), Section 42, Title 46, *supra, is as follows*:

> "§ 42. Who may practice as attorneys.—Only such persons as are regularly licensed have authority to practice law. For the purposes of this article, the practice of law is defined as follows: Whoever, * * * (d) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law."

That section provides that one who adjusts a defaulted, controverted or disputed account, claim or demand between persons with either of whom he is in privity or with whom he stands in the relation of employer and employee in the ordinary sense, is not engaged in the practice of law.

Appellants contend, however, that if such a construction be placed on the statute it would deny to them the equal protection of the laws and, therefore, would be unconstitutional. We do not agree with this contention. The rules by which classifications for the purpose of legislation must be tested are stated concisely and clearly in the opinion of the United States

Supreme Court in *Lindsley v. Natural Carbonic Gas Company,* 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, as follows:

1. The equal protection clause of the 14th Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids which is done only when it is without any reasonable basis and, therefore, is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

3. When the classification in such a statute is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classifications of such a law must carry the burden of showning that it does not rest upon any reasonable basis, but is essentially arbitrary.

The Supreme Court of Appeals of Virginia in the case of *Bryce v. Gillespie,* 160 Va. 137, 168 S. E. 653, applied these rules to a statute somewhat similar to the one here under consideration and concluded that the act did not violate the equal protection clause of the 14th Amendment. Though not committing ourselves to the soundness of the opinion of the Virginia Court in the Bryce case in its entirety, yet we

refer thereto as concurring in the reasoning there employed upon the matter of discrimination. In that view of the matter subdivision (d) of Section 42, Title 46, *supra,* is not unconstitutional as denying to the independent insurance adjuster equal protection of the laws guaranteed to him by the 14th Amendment to the Constitution of the United States.

Application for rehearing overruled.

All the Justices concur.

APPENDIX "B"

TITLE 46, SECTION 42, CODE OF ALABAMA 1940

Sec. 42. WHO MAY PRACTICE AS ATTORNEYS.—Only such persons as are regularly licensed have authority to practice law. For the purposes of this article, the practice of law is defined as follows: Whoever, (a) in a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a Court or a justice of the peace, or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the State or any subdivision thereof; or, (b) for a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or, (c) for a con-

sideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or, (d) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law. Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands; nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon. Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this article to be an act of practicing law, is guilty of a misdemeanor, and on conviction must be punished as provided by law. And any person, firm or corporation who conspires with, or aids and abets, another person, firm or corporation in the commission of such misdemeanor must, on conviction be punished as provided by law.

IN THE

Supreme Court of the Unitee States

OCTOBER TERM, 1943

No.....

J. L. WILKEY AND J. L. WILKEY ADJUSTER, INC.,
Petitioners,

v.

STATE OF ALABAMA, EX REL., JIM C. SMITH AND JIM C. SMITH, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Court Below

The opinion of the Supreme Court of Alabama, found as "A" in Appendix to Petition (also R.

274), the highest Court of the State, of which complaint is here made, is reported as:

Wilkey v. State, 14 So. (2d) 536.

Opinions of the Supreme Court of Alabama on previous appeals in the same case deciding points not here material are reported as follows:

Wilkey v. State, 238 Ala. 121; 189 So. 198;
Wilkey v. State, 238 Ala. 595; 192 So. 588; 129 A.L.R. 549.

An opinion of the Supreme Court of Alabama in a case to which these petitioners were parties respondent and the Birmingham Bar Association was a party complainant, involving much the same question is:

Birmingham Bar Association v. Phillips & Marsh, J. L. Wilkey, et al., 239 Ala. 650; 196 So. 725.

II.

Jurisdiction

(1) Jurisdiction is conferred upon this Court by Section 237 (b) of the Judicial Code as amended by Act of Congress of February 13th, 1925, (U.S.C.A., Title 28, Section 344 (b)).

(2) The original judgment of the Supreme Court of Alabama was rendered on the 13th day of May, 1943 (R. 274). An application for rehearing was

duly filed on the 26th day of May, 1943, within the time allowed by Rule 38 of the Supreme Court of Alabama. (Appendix to Title 7, Code of Alabama of 1940, page 1018.) The application for a rehearing was denied on June 30, 1943.

III.

A full statement of the case has been given under heading "A" in the petition and in the interest of brevity, the statement is not repeated here.

IV.

Specifications of Error

(1) The Supreme Court of Alabama erred in holding that subdivision (d) of Section 42, Title 46 of the Code of Alabama of 1940 as construed by the Court is constitutional.

(2) The Supreme Court of Alabama erred in holding that subdivision (d) of Section 42, Title 46 of the Code of Alabama of 1940 as construed by that Court does not deny to the petitioners and other "independent insurance adjusters" equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(3) The Supreme Court of Alabama erred in holding that subdivision (d) of Section 42, Title 46 of the Code of Alabama of 1940 as construed by that Court does not deprive petitioners of liberty or property without due process of law.

(4) The Supreme Court of Alabama erred in holding that subdivision (d) of Section 42, Title 46, Code of Alabama of 1940 does not without due process of law deprive petitioners of the porperty right to pursue the vocation of independent insurance adjusters on like terms and conditions as others similiarly situated.

(5) The Supreme Court of Alabama erred in holding valid and constitutional the statute (Subsection (d) Section 42, Title 46, Code of Alabama of 1940) which it found permitted an adjuster paid full time by an insurance company, to settle and adjust controverted and disputed claims, and denied that right to petitioner an insurance adjuster paid by the hour.

V.

ARGUMENT

POINT A

Subdivision (d) of Section 42, Title 46, Code of Alabama of 1940 as construed by the Supreme Court of Alabama denies independent adjusters, and petitioners as such, equal protection of the laws and is unconstitutional and void.

The Alabama Act involved appears in Appendix to Petition as "B".

There is a well defined business or vocation, engaged in by laymen throughout the history of insurance underwriting, consisting of the settling or ad-

justing or disputed or controverted claims against insurance companies.

This suit was brought below to exclude all laymen, whether full time or part time, from this field of activity and to preempt it for lawyers exclusively (R. 4).

The Supreme Court of Alabama, however, has given such meaning to the Alabama statute (Appendix "B") defining the practice of law (Sec. 42, Title 46, Code of Ala. 1940) that it has the effect (a) of permitting laymen to engage in said occupation provided they are hired on a salary basis by one company or a group of companies acting together and (b) of denying the right to other laymen equally well qualified, equally honest equally entitled to earn a living, equally acceptable to the insurance companies involved and equally taxed through licenses for engaging in this vocation, merely because they serve on a part time basis for two or more insurance companies who do not act as a group and who pay them by the hour.

Each type of adjuster is licensed by the State of Alabama (Section 455, Title 51, Code of Alabama 1940) and is entitled to the equal protection of its laws.

The Supreme Court of Alabama takes the view that adjusters paid by the hour are not "employees in the ordinary sense" within the meaning of the said statute. This Court will, we assume, take judicial notice of the fact that an overwhelming majority of employees in the United States are paid by the hour. Employees paid thus are more truly than any others,

within the terms of statute "employees in the ordinary sense".

There is no basis for claiming that the public interest will be served; nor that the insurance business will be served; nor even that the interest of the salaried adjuster will be served by the holding the salaried laymen may adjust while his fellow, paid differently, may not. This anomaly comes about as a by-product of the fight by some lawyers to preempt the field of adjusting controverted or disputed insurance claims for the legal profession. The only two previous cases in the United States squarely on this point held against the Bar as does this case in so far as the full time adjuster is concerned. See: *Liberty Mutual Ins. Co. v. Jones,* (Missouri) 130 S. W. (2d) 945; *State of Wis., ex rel v. Rice,* (Wisconsin) 294 N. W. 550. In the case at bar the Court substantially follows the two cited cases but draws an arbitrary distinction against non-salaried adjusters and bases its decision on the Alabama statute defining the practice of law above cited.

The classification set up is entirely arbitrary and has no relation to any public interest or private right involved.

The Supreme Court of Alabama attempts to justify by reference to the case of *Bryce v. Gillespie,* 160 Va. 137; 168 S. E. 653. That case is dealing with an entirely different aspect of this factual situation.

May we refer this Court to one of its cases dealing with somewhat similar facts under the Fourteenth Amendment? We refer to the case of *Hartford Steam Boiler Inspection and Insurance Company v. Harri-*

son, 301 U. S. 459; 57 S. Ct. 838. The State of Georgia adopted a statute, the effect of which was that mutual insurance companies could perform certain acts in Georgia through the agency of full time salaried employees, but stock insurance companies such as the Hartford Company were required to perform the same acts through agents paid on commission basis. This Court held that there was no basis for this classification and for convenience we quote part of the opinion:

> "* * * That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' * * * Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. * * *
>
> "Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safe-guard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. * * * They cannot stand as reasonable if they offend the plain standards of common sense. In this instance, the appellant company had been licensed to do business in the State and was entitled to equal protection in conducting that business. The answer of the insurance commissioner admitted that he was 'entirely satisfied as to the character, standing, responsibility, ability, and knowledge' of the proposed agent, and that the license was

refused solely because he was a 'salaried' employee. It is plain that the requirement that the resident agents of stock companies should not work on a salary has no relation to economy or efficiency in management. The answer of the insurance commissioner states that all of the contracts of mutual fire and casualty insurance companies are 'negotiated by salaried employees' and this method of doing business was adopted 'in order to reduce the expenses of operation and thus benefit the policyholders themselves'.

"It is idle to elaborate the difference between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these differences. We can discover no reasonable basis for permitting mutual insurance companies to act through salaried resident employees and exclude stock companies from the same privilege. * * *"

May we mention a decision by the Supreme Court of Oklahoma? *State of Oklahoma, ex rel. Short v. Reidell,* 109 Okla. 35; 233 Pac. 684; 42 A. L. R. 765. The public accountants of Oklahoma secured the adoption by that State of an Act providing that public and professional accountants who had not passed the State Board of Accountancy test could not engage in accounting work or advertise themselves as qualified to serve the public. The Supreme Court of Oklahoma in an able opinion held that this statute denied the equal protection of the laws to the uncertified accountants. We quote only the concluding paragraph:

"Our conclusion, therefore, is that the act, in

so far as it prohibits uncertified accountants from holding themselves out as professional or expert accountants or auditors for compensation or engaging in the practice of that profession, is in conflict with the spirit and express provision of the Constitution and void, in this, that it abridges the right of private property and infringes upon the right of contract in matters purely of private concern bearing no perceptible relation to the general or public welfare, and thereby tends to create a monopoly in the profession of accountancy for the benefit of certified accountants, and denies to uncertified accountants the equal protection of the laws and the enjoyment of the gains of their own industry. The defendants are not engaged in the exercise of a franchise, but a constitutionally guaranteed right."

POINT B

Subdivision (d), Section 42, Title 46, Code of Alabama 1940 as construed by the Supreme Court of Alabama recognizes that the adjustment of controverted and disputed claims is a legitimate business or occupation in which certain laymen may engage. It denies the right to follow that occupation to independent insurance adjusters because they are paid by the hour and by so doing it deprives petitioners and other independent insurance adjusters of liberty and property without due process of law.

The salaried adjuster according to the definition laid down by the Supreme Court of Alabama need

have no different qualifications, no different character, no different capacities and pay no different licenses from the part-time adjuster. In fact, the part-time adjuster can become the salaried adjuster by a change merely in the method of his compensation.

We submit that to deny the part-time adjuster the right to engage in this gainful occupation serves no public interest and in fact no private interest unless it be slightly to reduce competition with the lawyers.

Of all the cases decided by this Court on due process of law, we beg leave to quote three sentences from *Allgeyer v. State of Louisiana,* 165 U. S. 590; 41 S. Ct. 832:

> "* * * Again on page 764 (589), the learned Justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again, on page 765 (590): 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him, to a certain extent, of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the 14th Amendment."

A great part of the adjusting for insurance companies throughout the country the Court judicially knows, is done by independent insurance adjusters. Certainly over ninety per cent of the insurance companies doing casualty business use independent or part-time adjusters for some of their work whom they pay, as the Supreme Court says, by the hour. It will be a gross blow to these companies, as much so as to their independent adjusters, if this practice is disrupted, especially in this time of man power shortage.

Only a very few of the very largest casualty insurance companies have sufficient business throughout the whole country that they can keep a salaried adjuster in reach of every insured. The other companies must depend on the independent adjuster to service their assureds, or they are driven to hiring lawyers wit htheir higher training and cost to do a service which a competitor insurance company has done by a salaried layman.

Insurannce companies when joined in a suit attempting to accomplish this end directly, fought it vigorously and successfully in Alabama. See the case in which this petitioner was joined as a party, along with many insurance companies by the same Bar.

> *Birmingham Bar Association v. Phillips & Marsh, J. L. Wilkey, et al.*, 239 Ala. 650; 196 So. 725.

If the judgment of the Supreme Court of Alabama is allowed to stand there will have been accomplish-

ed indirectly, what the same Court refused to permit directly.

We urge that the State has no right to destroy the well recognized vocation of independent insurance adjuster.

We quote from this Court's general statement on that question in *New State Ice Co. v. Liebman,* 285 U. S. 262; 52 S. Ct. 371:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that Amendment, nothing is more clearly settled than that it is beyond the power of a State, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' "

We recognize the pressure of work on this Court. This case does involve vital rights of petitioners, a question of substantial public importance and one where rights guaranteed by the United States Constitution are denied, and for that reason this petition is most respectfully and urgently presented.

James A. Simpson

JAMES A. SIMPSON,
Counsel for Petitioners.

STATE OF ALABAMA}
JEFFERSON COUNTY }

I have served a copy of the foregoing Petition for Writ of Certiorari and brief upon Hon. Wm. Marvin Woodall and upon Hon. Francis Hare, counsel for respondents, at their offices in the City of Birand Ji mC. Smith at their offices in the City of Birmingham, Alabama on this the 23 day of September, 1943.

This the 23 day of September, 1943.

James A. Simpson

JAMES A. SIMPSON
Counsel for Petitioners.

Sworn to and subscribed before me this the 23 day of September, 1943.

Connie Cowart

Notary Public

(13)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 400

J. L. WILKEY AND J. L. WILKEY ADJUSTER, INC., a Corporation,

Petitioners,

vs.

STATE OF ALABAMA EX REL., JIM C. SMITH AND JIM C. SMITH

Respondents.

(6TH DIV. 970
ALABAMA SUPREME COURT)

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

OPPOSING BRIEF

OF

WILLIAM MARVIN WOODALL
AND
FRANCIS H. HARE,
Counsel for Respondents.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 400

J. L. WILKEY AND J. L. WILKEY ADJUSTER, INC., a Corporation,

Petitioners.

vs.

STATE OF ALABAMA EX REL., JIM C. SMITH AND JIM C. SMITH

Respondents.

(6TH DIV. 970
ALABAMA SUPREME COURT)

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

SUBJECT INDEX

	Pages
A–Summary Statement of the Matter Involved	1-12
General Acts Alabama 1931, page 606, defining and regulating and licensing the practice of law—original Act; codified in Code of Alabama of 1940 as Section 42, Title 46	1-2
Report of Attorney General of Alabama, 1936-38, page 56, as to said Act and as to License Schedule 5, Section 348 of Acts 1935 as to Insurance Adjusters	8-10
Petitioners speak for themselves as to their vast "Independent Contractor" business involved	10-12
B–"Erroneous Reasons" relied on by Petitioners for the allowance of the sought-for Writ of Certiorari	12-13

RESPONDENTS' OPPOSING BRIEF:

	Pages
Propositions of Law	13-16
Proposition of Law I	13-14
Proposition of Law II	14
Proposition of Law III	14-15
Proposition of Law IV	15-16
Proposition of Law IV (a)	16
Argument	17-48
Point A	17
Under Proposition of Law I	17-24
Under Proposition of Law II	24-30
Under Proposition of Law III	30-34
Under Proposition of Law IV	34-43
Alabama Supreme Court decision in case at bar on rehearing, dealing with the Federal Constitution issue involved	34-35
The right to practice law is a franchise, not acquired by user, Statute of Limitations or prescription	41-42
Under Proposition of Law IV (a)	43-46
(Showing that Petitioners' cited four cases, respecting Federal issue involved, to be inapt)	43-46
Point B	46-47
Conclusion	47-48
Certificate of service of copy of Opposing Brief	48

AUTHORITIES AND CASES CITED

Pages

A. CASES INVOLVED:

Wilkey et al. v. State ex rel. Smith et al., ... Ala. ....., 14 So. (2d) 536 ..... 1, 3, 5, 6, 7, 12, 13, 14, 16, 29, 30, 32, 33, 34, 35, 42, 43, 46 and 47

Alabama Constitution of 1901,

Sec. 42 ..... 14, 24, 29

Sec. 43 ..... 14, 24, 29

Sec. 139 ..... 14, 24, 25, 29

Sec. 140 ..... 14, 25, 29

"An Act," defining, regulating and licensing the practice of law, etc. Gen. Acts Ala. 1931, page 606. (Codified in Code Ala. 1940, Tit. 46, Sec. 42 ..... 1, 2, 3, 4, 5, 9, 10, 15, 30, 32, 33, 34, 35, 42, 43, 46, 47

Allgeyer v. State of Louisiana, 165 U. S. 590, 41 L. ed. 832 (*Cited by Petitioners*) 12, 30, 43, 16

Allison-Russell Withington Co. v. Sommers, 219 Ala. 33, 121 So. 42 15

Berk v. State ex rel. Thompson, 225 Ala. 324, 142 So. 832, 84 A. L. R. 740, with Annotation: "Making collections as practice of law" 2, 3, 13, 14, 15, 19, 24, 25, 26

Bessemer Bar Association v. Fitzpatrick, 239 Ala. 663, 196 So. 733 ..... 3, 14, 27

Birmingham Bar Association v. Phillips and Marsh, 239 Ala. 650, 196 So. 725 ..... 14, 19

Bradstreet v. Everson, 72 Pa. St. 124 ..... 15, 32

Bryce v. Gillespie (Supreme Court of Appeals) 160 Va. 137, 168 S. E. 653 ..... 16, 35, 39

Collum Motor Co. v. Anderson, 222 Ala. 643, 133 So. 693 ..... 15, 31

Ex parte Garland, 71 U. S. 333, 4 Wallace 333, 18 L. ed. 366 ..... 13, 17, 18

Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A. L. R. 671 ..... 14, 27, 28

Hartford Steam Boiler Inspection and Insurance Company v. Harrison, 301 U. S. 459, 57 S. Ct. 838. (*Cited by Petitioners*) 12, 30, 43, 44

Hoover v. Wise, 91 U. S. 308 ..... 15, 32

In Re Dorsey, 7 Porter (Ala.) 295 13

In Re Lockwood, 154 U. S. 116, 14 S. Ct. 1082, 38 L. ed. 929 ..... 13, 17

In Re Tracy, 266 N. W. 88 (Minn.) 41, 42

Lehmann v. State Board of Public Accountancy, 208 Ala. 185, 94 So. 94 ..... 14, 44, 45

Lewis v. Peck, 10 Ala. 142 ..... 15, 32

Pages

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 340, 55 L. ed. 369, Ann. Cas. 1912 C, 160 ..... 16, 35, 39, 41

Lynch Jewelry Co. v. Bass, 220 Ala. 96, 124 So. 222 ..... 15, 31

Meunier v. Bernich (La. App.), 170 So. 567 ..... 13, 14, 18, 26

Milligan et al. v. Alabama Fertilizer Co., 89 Ala. 322, 7 So. 650 ..... 15, 31, 32

New State Ice Co. v. Liebman, 285 U. S. 262, 52 S. Ct. 371, 76 L. ed. 747 (*Cited by Petitioners*) 12, 30, 43, 46

Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 S. Ct. Rep. 578 ..... 16, 41

People v. Stanford, 77 Calif. 360, 18 Pac. 85 ..... 41, 42

Re Integration of Nebraska State Bar Association, 275 N. W. 265, ... Nebraska ....., 114 A. L. R. 151 ..... 14, 28, 29

Rochester-Hall Drug Co. v. Bowden, 218 Ala. 242, 118 So. 674 15

State v. Polakow's Realty Experts, Inc., et al, 243 Ala. 441, 10 So. 2d 461. (Court opinion per Gardner, Chief Justice) 16

State v. Rosborough, 152 La. 945, 94 So. 858 ..... 13, 19

State ex rel. Highsmith v. Brown-Service Funeral Co., 236 Ala. 240, 182 So. 18 16

State of Okla. ex rel. Short, Attorney General et al. v. Riedell et al., 109 Okla. 35, 233 Pac. 684, 42 A. L. R. 765. (*Also, cited by Petitioners*) 14, 30, 43, 44, 45, 46

Wilkey et al. v. State ex rel. Smith, 238 Ala. 121, 189 So. 198 ..... 2, 3, 13, 14, 15, 29, 32

Williams v. Knight, 233 Ala. 42, 169 So. 871 ..... 14, 26

I

May it Please the Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

Correcting inaccuracies or omissions in the statement of the other side, Petitioners in this proceeding. Supreme Court Rule 27 (4).

Respondents duly instituted in the Circuit Court of Jefferson County, Alabama, on *September 21, 1937*, proceedings on information or petition *in the nature of quo warranto* against the Petitioners, now, who seek writ of Certiorari ~~warranto~~ from Supreme Court of the United States to Supreme Court of Alabama, in the case there decided May 13, 1943, and rehearing denied June 30, 1943, affirming the judgment of the Circuit Court in favor of the Plaintiffs therein. *Wilkey et al vs. State ex rel Smith, 6 Div. 970, Supreme Court of Alabama, 14 So. 2d, page 536.* Tr. of Rec. 210-231.

The Act of the Legislature of Alabama, involved in this Certiorari proceedings, and as construed by the Supreme Court of Alabama in the case cited, was approved, and became effective, on July 20, 1931, *General Acts Alabama 1931, page 606, which defines and regulates the practice of law and requires a license for practicing law.*

Said Act was codified in the Code of Alabama of 1940 as Section 42 of Title 46, entitled: "Who May Practice As Attorneys," omitting the title and the enacting clause, and sections following Section 3 of the original Act. Since the original proceedings in this case were instituted under said original Act and before the Code of 1940, we quote the title and the enacting clause and pertinent parts of said original Act, as presently involved in this litigation viz:

"AN ACT

"*To further regulate the practice of law;* providing who may practice law; *defining the practice of law; requiring a license for practicing law;* and providing penalties for violations of the Act.

"Be it Enacted by the Legislature of Alabama:

"Section 1. Only such persons as are regularly licensed have authority to practice law.

"Section 2. *For the purpose of this Act, the practice of law is defined as follows: Whoever,* (a) * * * * or (d) *As a vocation,* enforces, secures, settles, adjusts or compromises *defaulted, controverted or disputed* accounts, claims or demands *between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is Practicticing Law. Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands;* * * *

"Section 3. Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this Act to be an act of practicing law, is guilty of a misdemeanor, and on conviction must be punished as provided by law. And any person, firm or corporation who conspires with, or aids and abets, another person, firm or corporation in the commission of such misdemeanor must, on conviction, be punished as provided by law.

"Section 4. If any clause, section, division or portion of this Act shall be held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect any other section, clause, division or portion of this Act which is not itself unconstitutional." (Emphasis supplied).

The constitutionality of said original Act, as to both State and Federal Constitutions, was upheld by the Supreme Court of Alabama, *First:* As applied to an *"Independent Contractor,"*—one conducting commercial collection agency who was held to be engaged in "Practice of Law," as defined by this Act, and reported in the case of *Berk vs. State, 225 Ala. 324, 142 So. 832, 84 A. L. R. 740;* and the decision of which case was followed and applied on the first appeal in the present litigation—as to an *"Independent Contractor"*—persons conducting a *"vocation"* of *Independent Insurance Adjusters,* wherein the court held as shown by Headnote 4 thereof, as follows:

"4. Quo warranto Key 50 (1).

"In quo warranto proceedings charging respondents with practicing law without license, special plea of respondents that respondents were not employees of casualty and fire insurance companies 'in ordinary sense,' nor 'in privity' with such companies but were engaged in insurance adjustment business representing regular clientele, showed that their acts of settting claims for such companies constituted 'practice of law' prohibited by statute. Code 1923, Sec. 9932, par. 1; Gen. Acts 1931, p. 606.

"To be in 'privity' to another, a man must claim by or under that other, by blood, as heir, by representation, as executor, or by contract, as vendee, assignee, and the like."

Wilkey et al vs. State ex rel Smith, 238 Ala. 121, 189 So. 198.

The decision of the Alabama Supreme Court in the *Berk Case, supra,* was then adhered to in the case of *Bessemer Bar Association vs. Fitzpatrick, 239 Ala. 663, 196 So. 733,* as applied to an *"Independent Contractor"*—one appearing in court and acting as an Attorney at Law in proceedings in court, but one not licensed to practice, wherein the court said:

"We adhere to the decision rendered in Berk v. State ex rel. Thompson, 225 Ala. 324, 142 So. 832, 84 A. L. R. 740, defining the practice of the law in and out of court." (Emphasis supplied).

Then, the decision of the Alabama Supreme Court in the *Berk case, supra,* was again upheld and applied by the Supreme Court of Alabama on the last appeal in the present litigation, as applied to *"Independent Contractors"*—persons conducting a *"vocation"* of *Independent Insurance Adjusters,* wherein the court held as follows:

"In 1931 the legislature re-enacted the 1927 act en haec verba (Act No. 493, H. 606, *approved July 20, 1931, General Acts 1931, page 606). This latter act*

was held constitutional in the case of Berk v. State ex rel. Thompson, 225 Ala. 324, 142 So. 832, 837, 84 A. L. R. 740, from which case we quote as follows: 'It is well established that the act in question (Gen. Acts 1931, p. 606) is a valid enactment under the police power, and offends neither state nor Federal Constitution; is not usurpation of judicial power; does not deprive of liberty or property without due process; neither denies to citizens equal civil rights, nor grants special privileges and immunities; does not violate, impair, or deny rights retained by the people, and does not violate the Fourteenth Amendment to the Federal Constitution'." (Emphasis supplied).

HEADNOTES

"7. Attorney and client Key 11:

"*The statute providing that one who as a vocation* enforces, secures, settles, adjusts, or compromises *defaulted, controverted, or disputed* accounts, claims, or demands *between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense* is 'practicing law,' *is not confined to insurance disputes, but is broad enough to include them and should be so interpreted.* Code 1940, Tit. 46, Sec. 42 (d)."

* * *

"9. Attorney and client Key 11:

"After a default, dispute, or controversy has arisen, the independent lay adjuster must step aside, for then the law declares that the further adjustment or litigation must be handled by a regularly licensed lawyer. Code 1940, Tit. 46, Sec. 42 (d)."

"ON REHEARING

"27. Constitutional law Key 212:

"The 'equal protection of the law' clause of the Fourteenth Amendment *does not take from the state the power to classify in the adoption of police laws, but admits of the*

exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. U. S. C. A. Const. Amend. 14."

"31. Attorney and client Key 1, 11;

Constitutional law Key 238 (1) :

"*Under the statute one who adjusts* a defaulted, controverted, or disputed account, claim, or demand *between persons with either of whom he is in privity or with whom he stands in the relation of employer and employee in the ordinary sense, is not engaged in 'practicing law,' and the statute so construed is not unconstitutional as depriving an independent insurance adjuster of 'equal protection of the law.'* Code 1940, Tit. 46, Sec. 42 (d) ; U. S. C. A. Const. Amend. 14." (Emphasis supplied) .

Wilkey et al v. State ex rel Smith, 6 Div. 970 (Supreme Court of Alabama), 14 So. Rep. 2d, 536

The Brief of Petitioners in the case at Bar, in stating "A Summary of the Facts," quotes, on pages 6 to 13, from the opinion of the Supreme Court of Alabama in this case reported in *14 So. 2d, 536,* and which opinion in full is stated to be shown fully in: " 'A' in Appendix hereto."

On page 8 of the Petitioners' Brief, at the end of the first paragraph, an omission is shown. We now supply that omission. (See Brief pp. 26, 27; 14 So. 2d, page 541) :

> "The record is not in all respects clear as to the procedure and practice customarily followed by respondents in investigating, adjusting and settling claims. The scope of respondents' activity and authority seems to have depended on the type of claim investigated and in some instances it is not clear as to which type of claim the evidence as to the procedure and practice employed by respondents related." Tr. of Rec. 215.

On page 9 of the Petitioners' Brief in paragraph numbered: " (c) Automobile Collision Claims," an omission is shown. We now supply that omission. (See Brief p. 29; 14 So. 2d, page 542) :

"It appears, however, that in at least one instance the respondents determined the amount of the payment after taking into consideration the deductible features in the contract of insurance. *In some instances respondents notified insurance companies and individuals as to their subrogation rights and had claimants execute lien subrogation papers. Payment was made to claimant by the insurance company.*" (Emphasis supplied). Tr. of Rec. 217.

In addition, we quote paragraphs 18 and 19 of the opinion of the Supreme Court of Alabama, 14 So. 2d, page 547, and in Petitioners' Brief, page 45, viz:

"(18, 19): An independent lay insurance adjuster may not advise or recommend that insurance companies have subrogation or contribution claims against other insurance companies or individuals, as such action involves the giving of legal advice and constitutes the practice of law. The evidence shows that one Robinson and one Kelly were involved in an automobile collision. Robinson was covered by collision insurance carried by the Home Insurance Company, represented by appellants. The Home Insurance Company paid the claim filed by Robinson, *whereupon respondents notified Kelly and his counsel or counsel for his insurance carrier that the Home Insurance Company had paid the claim and were holding subrogation rights and advised that any settlement made should subrogate the equity of the Home Insurance Company on account of their expenditure. We think this action on the part of appellants constituted the practice of law.*" (Emphasis supplied). Tr. of Rec. 228.

On page 11 of the Petitioners' Brief, at the end of the first paragraph, an omission is shown. We now supply that omission. (See Brief p. 31; 14 So. 2d, page 542):

"On one occasion it appears that respondents, after the claimant had refused the amount offered him, recommended to the insurance company that the payment be increased. In connection with this same mat-

ter the respondent Wilkey advised the claimant that he could not enter suit on behalf of his wife to recover for the losses sustained by her as a result of her absence from work while caring for claimant.

"On another occasion after the claimant refused to accept the amount offered, the respondents continued to handle the matter and finally drew a draft on the insurance company for an increased amount in accordance with the company's authorization." Tr. of Rec. 218.

On page 13 of the Petitioners' Brief, the second paragraph ends with a part of the quotation from the Supreme Court opinion, reading: "The appellants, unquestionably, should be classed as 'independent insurance adjusters,' * * * *." We now supply the omission, and quote the whole sentence of the Supreme Court of Alabama, (See Brief p. 33; 14 So. 2d, page 543), as follows:

> "(1) The appellants, unquestionably, should be classed as 'independent insurance adjusters,' but the decision here cannot be predicted in all of its phases on the Wisconsin case, supra, *for the reason that our statute defining the practice of law is in most respects different from the Wisconsin statute relating thereto.*" (Emphasis supplied). Tr. of Rec. 220.

In addition, we quote the following two paragraphs from the opinion of the Supreme Court of Alabama, appearing on page *546* of 14 Southern Reporter, 2d Series; and in Petitioners' Brief pages 42 and 43, viz:

> "We think it may well be assumed that there are many negotiations and inquiries after a loss by and between insured and the company for which independent lay adjusters are well qualified to perform. That is their specialized field of activity in which they have been found to be duly qualified to serve. *The lawyer must come into an adjustment as soon as a controversy or dispute arises or a default occurs. Any sort of controversy or dispute is the statutory line of demarcation.* Tr. of Rec. 226.

> *"We must determine,* therefore, as to *whether or not the facts in this case show that the appellants have been engaged in enforcing, securing, settling, adjusting or compromising defaulted, controverted or disputed accounts, claims or demands, as* distinguished from claims or demands which have not reached the stage of a default, controversy or dispute." Tr. of Rec. 226, 227.

NOTICE: On page 56 of Petitioners' Brief, appears the following paragraph:

> "Each type of adjuster is licensed by the State of Alabama (Section 455, Title 51, Code of Alabama 1940) and is entitled to the equal protection of its laws."

This statement is erroneous, because that Section of the Code of Alabama provides—in effect—*that the license tax shall not apply to "an employee in the ordinary sense"* of an insurance company; and as said Section has been so construed by the Attorney General of Alabama, as noted under said Section in the Alabama Code of 1940. We quote that Section in full, *together with the notation thereunder of the Attorney General's ruling:*

> "Sec. 455. Adjusters of fire, automobile, etc., insurance. Each adjuster of fire, automobile, property damage, collision liability or other losses, twenty-five dollars to the state, but no license shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person is engaged, each person so engaged shall pay the license provided for herein. The license paid in one county shall not be required to be paid in any other county in the state. *Provided that this license tax shall not apply to any local insurance agent who adjusts losses for the insurance company which he regularly represents. (Ib)." (1935, p. 442, Section 348, Schedule 5).*
>
> "A person not a regularly licensed attorney cannot become entitled as a matter of right *to engage in the business* of enforcing, settling, adjusting or comprom-

ising claims based on contracts or policies of insurance between persons with either of whom he is in privity in the relation of employer and employee in the usual sense by virtue merely of taking out and paying for a license under this section. Rep. Atty. Gen. 1936-38, p. 56." (Emphasis supplied).

ATTENTION!

The word "either" in the expression "with either of whom," appearing (supra) in the notation to the above Section, 455, of the Alabama Code of 1940, as being taken from the report of the Attorney General of Alabama 1936-38, p. 56, is erroneously used by the Annotator of the Code; whereas, the word "neither" should have been used instead.

To make this point clear beyond doubt, we quote the address and Propositions of Law stated in said report of the Attorney General, as found in *Biennial Report Attorney General Alabama, October 1, 1936-September 30, 1938, page 56,* as follows:

"December 5, 1936

"Hon. Eugene B. Henry,
Commissioner of Licenses,
Birmingham, Alabama.

"Practice of Law—

"1. A person not a regularly licensed attorney cannot become entitled as a matter of right to engage in the business of enforcing, settling, adjusting or compromising claims based on contracts or policies of insurance between persons with neither of whom he is in privity in the relation of employer and employee in the usual sense by virtue merely of taking out and paying for a license under General Acts, 1935, page 442, Schedule 5.

"2. Such statute, insofar as it might purport to grant any such right to other than a regularly licensed attorney at law would be unconstitutional as invasive of the powers of the judicial department.

"3. A person who is not a regularly licensed Attorney who engages in such action is subject to the penal-

ties provided in General Acts, 1931, p. 606 and other appropriate preventive action by the Courts.

"4. Such action in fact constituting the practice of law, a corporation, firm or other artificial creation cannot lawfully engage therein in any event.

Opinion by
Attorney General Carmichael."

* * *

PETITIONERS SPEAK FOR THEMSELVES AS TO THEIR VAST "INDEPENDENT CONTRACTOR" BUSINESS INVOLVED

We quote in this regard, from Plaintiffs' Exhibit "4-d" Transcript in the Supreme Court of Alabama in this case, at pages 205 and 206, omitting the map of Alabama thereto attached, as follows: (Tr. of Rec. 196 A. B.).

"Established 1928

HOME OFFICE
J. L. WILKEY ADJUSTER, INC.
WATTS BUILDING
BIRMINGHAM, ALABAMA

—o—

BRANCH OFFICES

J. L. WILKEY ADJUSTER, INC.
WILSON BUILDING
ANNISTON, ALABAMA

J. L. WILKEY ADJUSTER, INC.
EYSTER BUILDING
DECATUR, ALABAMA

Charter Member

NATIONAL ASSOCIATION INDEPENDENT INSURANCE ADJUSTERS

—o—

Please refer to page two for history of business, and to MAP on page three for territory covered by each office."

Tr. p. 206:

"BIRMINGHAM OFFICE

"J. L. Wilkey, age forty-two, who has had twenty years experience, principally in Birmingham and North Alabama, owns the business and is in direct charge of this office. He spends all of his time here except one day each week which is spent in one or the other of the branch offices. We have five adjusters and three stenographers, and our well equipped offices are in the City's most modern office building.

"ANNISTON OFFICE

"Neal E. Sellers, Jr., age twenty-seven, who has lived in Anniston practically all of his life, and has had several years' experience in the handling of claims, is in direct charge of this office; which was opened January 1st, 1937, to give better service at less cost to the companies represented.

"DECATUR OFFICE

"Chas. G. Hardwick, Jr., age twenty-eight, who has lived in Decatur all of his life, and has worked in law and claim offices for several years, is in direct charge of this office; which was opened on January 1st, 1935, and has well justified its existence by giving our clients better service at less cost.

* * *

"The owner welcomes investigation as to character, integrity and ability among the large number of in-

surance companies represented, any bank or business concern, the Birmingham Chamber of Commerce, or any outstanding law firm in Birmingham or North Alabama.

"He assisted in organizing the Birmingham Claim Association in 1934, and has served continuously as its President. In the same year he led in the organization of the Alabama Information Bureau, maintained in our offices by some thirty claim departments, the records of which are available, without charge, to all companies we represent.

He called a meeting of business and professional men in 1935, out of which was organized the Anti-Racketeering Bureau of the Chamber of Commerce, on which committee he has served continuously, resulting in inestimable value to defendants.

"Since opening our Birmingham office of July 1st, 1928, we have handled over eleven thousand cases for a large number of insurance companies, to the general satisfaction of all concerned.

"Our branch offices were not opened with the idea of taking in more territory, but to have a local man in the center of the area covered to handled claims promptly, and with less time and out of town expense."

* * *

B

"ERRONEOUS REASONS" RELIED ON BY PETITIONERS FOR THE ALLOWANCE OF THE SOUGHT FOR WRIT OF CERTIORARI.

The Supreme Court of Alabama, *in the case at bar, has not* decided a federal question of substance in conflict with applicable decisions of the Supreme Court of the United States, including those cases cited on page *15* of the *Petition and Brief* of Petitioners herein; nor contrary to the principles of law established by the Supreme Court of the United States in said cases cited, *the statement of Petitioners to the contrary notwithstanding!*

Nor do Petitioners state any good or valid reason "for the allowance of the writ," or any special and important reasons for a review on Writ of Certiorari to the Supreme Court of Alabama in said cause!

The *said Statute of Alabama,* as construed by the Supreme Court of Alabama, *is a valid "police law" of said state,* not offending nor in violation of the 14th Amendment to the Constitution of the United States, *as applied to the "Vocation" of the Petitioners as Independent Insurance Adjusters,* viz: *"Independent Contractors,"* contrasted with *"employees in the ordinary sense"* of insurance company functioning, *involved in an Act, defining and regulating the practice of law for the public welfare!*

RESPONDENTS' OPPOSING BRIEF

PROPOSITIONS OF LAW

I

The right to practice law is not a privilege or immunity granted to all citizens of the United States. But, *it is a franchise* from the State conferred only for merit; *and is not a lawful business, except* for Members of the Bar who have complied with all the conditions required by Statute and Rules of the Court, *and such regulation is no violation of the Federal Constitution.*

Ex Parte Garland, 71 U. S. 333, 4 Wallace 333, 18 L. ed. 366.

In Re Lockwood, 154 U. S. 116, 14 S. Ct. 1082, 38 L. ed. 929.

Meunier v. Bernich, (La. App.), 170 So. 567.

State v. Rosborough, 152 La. 945, 94 So. 858.

In Re Dorsey, 7 Porter (Ala.) 295.

Berk v. State ex rel. Thompson, 225 Ala. 324, 142 So. 832., 84 A. L. R. 740, with Annotation: *"Making collections as practice of law."*

Wilkey et al. v. State ex rel. Smith, 238 Ala. 121, *189 So. 198.*

Bessemer Bar Association v. Fitzpatrick, 239 Ala. 663, *196 So. 733.*

Birmingham Bar Association v. Phillips and Marsh, 239 Ala. 650, *196 So. 725.*

Lehmann v. State Board of Public Accountancy, 208 Ala. 185, *94 So. 94.*

State of Oklahoma ex rel. Short, Atty. Gen. et al. v. Riedell et al. 109 Okla. 35, 233 Pac. 684, *42 A. L. R. 765.*

Wilkey et al. v. State ex rel. Smith, (Ala), *14 So. (2d) 536.*

II

The Supreme Court of Alabama—the highest Court of the State—while in the exercise of the sovereign judicial power of the State under its Constitution, *has the inherent power to define and regulate the practice of law, both in and out of Court,* in said State; and which power may be aided, *but not impinged,* by a valid enactment of the Legislature under the "police power."

Constitution of Ala. 1901, Sections 42, 43, 139, 140.

Berk v. State ex rel. Thompson, (supra).

Wilkey et al. v. State ex rel. Smith, both citations, (supra).

Bessemer Bar Association v. Fitzpatrick (supra).

Meunier v. Bernich, (supra).

Williams v. Knight, 233 Ala. 42, *169 So. 871.*

Re Integration of Nebraska State Bar Association, 275 N. W. 265, ... Nebraska ....., *114 A. L. R. 151.*

Ex parte Thompson, 228 Ala. 113, *152 So. 229,* 107 A. L. R. 671.

III

As a "Vocation," Independent Insurance Adjusters, whether claimant adjusters or defense adjusters, *are "Independent Contractors," and are not employees* "in the ordi-

nary sense," *nor are they "in privity"* with either of the other parties, while settling legal claims or demands of or against insurance companies represented by them.

J. L. Wilkey et al. v. State ex rel. Smith, 238 Ala. 121, 189 So. 198.

Milligan et al. v. Alabama Fertilizer Co., 89 Ala. 322, 7 So. 650.

Collum Motor Co. v. Anderson, 222 Ala. 643, 133 So. 693.

Lynch Jewelry Co. v. Bass, 220 Ala. 96, 124 So. 222.

Hoover v. Wise, 91 U. S. 308.

Bradstreet v. Everson, 72 Pa. St. 124.

Lewis v. Peck, 10 Ala. 142.

Rochester-Hall Drug Co. v. Bowden, 218 Ala. 242, 118 So. 674.

Allison-Russell Withington Co. v. Sommers, 219 Ala. 33, 121 So. 42.

Berk v. State ex rel. Thompson, 225 Ala. 324, 142 So. 832, 84 A. L. R. 740.

IV

The Statute of Alabama—entitled: "An Act to further regulate the practice of law; providing who may practice law; defining the practice of law; requiring a license for practicing law; and providing penalties for violations of the Act." *(Gen. Acts Ala. 1931 p. 606;* Codified in *Code Ala. 1940, Tit. 46, Section 42)*—as construed by the Supreme Court of Alabama *in the case at bar favorably* as to *"an employee in the ordinary sense,"* as against a *"Vocation"* of *"an Independent Insurance Adjuster,"* with respect to being engaged or not in *"practicing law"* within its provisions, *is a valid "police law"* of said State *in aid of the Supreme Court,* and does not offend or violate the 14th Amendment to the Federal Constitution as depriving the "Independent Insurance Adjuster" of "equal protection of the laws," or "due process."

Because: as applied to the *"Vocation"* of the *Petitioners* as Independent Insurance Adjusters, viz: *"Independent*

Contractors," contrasted with *"employees in the ordinary sense"* of insurance company functioning within the purview of the Act, *defining and regulating the practice of law for the public welfare: "the substantial difference in point of harmful result,* so far as the case as *made shown, may exist*—(when *"as soon as a controversy or dispute arises or a default occurs—any sort of controversy or dispute")—affords a reasonable basis, under the equal protection-of-the-laws clause of the Federal Constitution for exemption"* of the activity of the *"employee in the ordinary sense"* "from the operation of the provisions" of the Legislative Act.

Wilkey et al. v. State ex rel. Smith, 14 So. (2d) 536, 538, 546, 548, 549.

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 340, *55 L. ed. 369, Ann. Cas. 1912 C. 160.*

Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 S. Ct. Rep. 578.

Bryce v. Gillespie, (Supreme Court of Appeals), *160 Va. 137, 168 S. E. 653.*

State v. Polakow's Realty Experts, Inc., et al, 243 Ala. 441, *10 So. (2d) 461.* (Court opinion per Gardner, Chief Justice).

State ex rel. Highsmith v. Brown-Service Funeral Co., 236 Ala. 249, *182 So. 18.*

(a) *The Petitioners* in their Brief, in the case at bar, *cite no authorities holding contrary to the foregoing proposition of law!*

ARGUMENT

POINT A

Subdivision (d) of Section 42, Title 46, Code of Alabama of 1940 as construed by the Supreme Court of Alabama, *does not* deny Independent Insurance Adjusters, and Petitioners as such, equal protection of the laws, and is *not* unconstitutional and void.

We quote pertinent parts of some of the decisions cited by us under the foregoing Propositions of Law:

Under Proposition of Law I:

In the cited case of *In Re Lockwood,* the Supreme Court of the United States, speaking through Mr. Chief Justice Fuller, held as shown by headnotes in 38 L. ed., page 929, as follows:

> "Right to practice law—not immunity of citizen—power of state court.
>
> "1. The refusal of the Supreme Court of Appeals of Virginia to admit the petitioner to practice law in that court on the ground that she is a woman, does not deny to her any privilege or immunity of a citizen of the United States.
>
> "2. The right to practice law in the state courts is not a privilege or immunity of a citizen of the United States.
>
> "3. It is for the state court to construe a statute of the state in regard to the admission of persons to practice law in its courts, and to determine whether the word 'person' therein used, is confined to men, or includes women."

In the cited case of *Ex Parte Garland,* the Supreme Court of the United States, speaking through Mr. Justice Field, said:

> "The attorney and counselor being, by the solemn judicial act of the Court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and

to argue causes, is something more than a mere indulgence, revocable at the pleasure of the Court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the Court, for moral and professional delinquency.

"The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life." (Emphasis supplied).

Mr. Justice Miller, writing the dissenting opinion in that case for himself, and concurred in by Chief Justice Chase, and Justice Swayne and Davis, said:

"The right to practice law in the courts *as a profession, is a privilege* granted by the law, *under such limitations or conditions in each state or government as the law making power may prescribe. It is a privilege, and not an absolute right. The distinction may be illustrated by the difference between the right of a party to a suit in court to defend his own cause, and the right of another to appear and defend for him. The one, like the right to life, liberty and the pursuit of happiness, is inalienable. The other is the privilege conferred by law on a person who complies with the prescribed conditions.*

"Every state in the Union, and every civilized government, *has laws by which the right to practice in its courts may be granted, and makes that right to depend* on the good moral character and professional skill of the party *on whom the privilege is conferred."* (Emphasis supplied).

In the cited case of *Meunier v. Bernich,* the Court of Appeals of Louisiana said:

"Further, the right to practice law is not a privilege or immunity granted to all citizens of the United States. See In Re Lockwood, 154 U. S. 116, 14 S. Ct. 1082, 38 L. ed. 929. But it is a franchise from the state conferred only for merit and is not a lawful busi-

ness except for members of the bar who have complied with all the conditions required by statute and the rules of the court. See State v. Rosborough, 152 La. 945, 94 So. 858." (Page 572).

In the cited case of *Birmingham Bar Association v. Phillips and Marsh,* the Supreme Court of Alabama said:

"The legal profession, men learned in the law, licensed upon evidence of their attainments in a wide range of substantive and procedural law, and upon evidence of good character, *are invested with a franchise granted by the State.* One of the major functions of the lawyer is the giving of legal advice to the layman that he may conduct his business according to law. Wise men generally look to him to draft their difficult legal documents, or give needed advice as to their form and contents."

* * *

"But this is not the only method of invoking the authority of the State *in the protection of franchises it has granted in the interest of the public.*"

* * *

"The proceeding in the instant case is not to punish for past acts of the accused, *but to adjudicate that they are engaging in the practice of law, thus intruding into the field of the legal profession usurping a franchise granted to those duly licensed,* seeks to suppress such wrong, and restrain respondents by injunction from further engaging in such unlawful practice of the law.

"This is the precise objective of proceedings in the nature of quo warranto." (Emphasis supplied). (Pages 731 and 732).

In the cited case of *Berk v. State ex rel Thompson,* the Supreme Court of Alabama, *in dealing with said Statute of Alabama,* now involved in the case at bar, as it had application to an *"Independent Contractor,"* viz: A Commercial Collection Agency's certain activities, *as shown by the evidence in that case,* said:

"Under the facts alleged in the petition relative to the alleged business of defendant-appellant, was he, had he been, and did he propose 'to practice law' unlawfully without having the required license to engage in such practice? *Otherwise stated, the first question for decision is: Did the averred acts constitute* 'the practicing of law' per se?

"The act regulating and defining the practice of law, approved July 20, 1931, provides in part as follows:

'Section 1. Only such persons as are regularly licensed have authority to practice law.

*'Section 2. For the purposes of this Act, the practice of law is defined as follows: Whoever, (a) * * * or, (d) As a vocation,* enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands *between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is Practicing Law.*

"Gen. Acts 1931, p. 606.

This prescription or legislative definition of the words 'practicing law' is specific, its own interpreter, and unambiguous.

"We are not without decisions in this jurisdiction that shed light upon the question, or shorthand rendition of facts and definition thereof that are pertinent.

"It was decided in Gullett v. Lewis, 3 Stew. 23, 27, that: 'An attorney at law is the special agent of his client, whose duties, usually are confined to the vigilant prosecution or defense of the suitor's rights. *By virtue of his engagement as an attorney, he is not authorized to compromise the matter of controversy,* to execute a release of his client's demand, or even to release the responsibility of a witness to his client, that he may be rendered competent. *When a note is placed in the hands of an attorney at law to collect, the only power granted to him is to receive the money if the payor will pay it without, or to enforce its payment by suit.'*

"Analogy is contained in Kirk v. Glover, 5 Stew. & P. 340, *in the definition and declaration of the doctrine of special agency in an attorney to collect in money, his client's suit prosecuted to judgment; or to collect it*

without suit; or to collect the claim the basis of a suit out of court, as was the case in Cook and Lamkin v. Bloodgood, 7 Ala. 683.

"The case of Chapman, Lyon and Noyes v. Cowles, 41 Ala. 103, 108, 109, 91 Am. Dec. 508, *contains authorities collected and reviewed as to the general authority of an attorney in the collection of a claim of his client, saying, among other things:* 'In Clark and Co. v. Kingsland (1 Smedes & M. (Miss.) 248), the court says: *"It is the business of an attorney to collect the money on claims placed in his hands for collection, and his authority as an attorney,* extends no further." * * * It is also held, in the case of McCarver v. Nealey, (1 G. Greene (Iowa) 360) *"that an attorney has no right to receive any thing but money in satisfaction of a demand placed in his hands for collection,* unless especially authorized to do so by his client'," and cites with approval Kirk v. Glover, 5 Stew. and P. 340; Craig v. Ely, 5 Stew. and P. 354; and Gullett v. Lewis, 3 Stew. 23.

"This well-established rule of the general power and agency of an attorney to collect in money for his clients in and out of court, with and without judgment or other legal process, as declared and defined in the last cited authority, was approved in Robinson v. Murphy, 69 Ala. 543, 548, where Mr. Chief Justice Brickell declared: 'All who deal with an attorney or other agent must ascertain the extent of his authority. If they do not inquire, they can claim no protection because they indulged suppositions or conjectures, reasonable or unreasonable, that the agent had the authority he was exercising. Gullett v. Lewis, 3 Stew. 23. *The law defined the extent of the general power of the attorney, and is presumed to be known of all men, more than fifty years ago. In the case of Gullett v. Lewis, supra, the power of an attorney at law was defined, this court saying:* He 'is the special agent of his client, whose duties usually are confined to the vigilant prosecution or defense of the suitor's rights. *By virtue of his engagement as an attorney, he is not authorized to compromise the matter of controversy,* to execute a release of his client's demand, or even to release the respon-

sibility of a witness to his client, that he may be rendered competent.' *The compromise of which the court was speaking, was not an adjustment of pending litigation, but the composition of an admitted debt. The authority of this case has never been disputed, and it has been often cited with approbation, as defining accurately the general power of an attorney.*

West v. Ball, 12 Ala. 340; Chapman v. Cowles, 41 Ala. 103, 91 Am. Dec. 508. Whoever has dealt, or may in this State deal with an attorney, can have no right to rely on his exercise of any other power, unless it is specially conferred. Whether it has been specially conferred, they must, at their own peril, ascertain. *The acceptance by the attorney of a less sum than was due upon the judgment did not operate its satisfaction; and the transfer or assignment of the judgment was in excess of his authority!* See, also, Craft v. Standard Acc. Ins. Co., 220 Ala. 6, 123 So. 271; 66 A. L. R. 108, 112; Senn v. Joseph, 106 Ala. 454, 17 So. 543; Gunn v. Clendenin, 68 Ala. 294; Bush v. Bumgardner, 212 Ala. 456, 102 So. 629; McDonald v. State, 143 Ala. 101, 39 So. 257; White v. Ward, 157 Ala. 345, 47 So. 166, 18 L. R. A. (N. S.) 568; Section 10267, Code.

"*In the recent case of Boykin, Solicitor General v. Hopkins, et al. (Ga. Sup.) 162 S. E. 796, 799, 802,* the Georgia court overruled its case of Atlanta Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S. E. 455, 458. In arriving at the conclusion that the applicant *sought to engage in the practice of law unlawfully, that court declared that acts constituting the practice of law are: To act as an attorney in fact for the settlement or adjustment of any and all claims; act as an attorney in fact for customers in procuring competent attorneys at law to represent such customers in any court or before any judicial body in this state in any contested or uncontested case or matter pending before such court or body, when an attorney at law is necessary; and furnish legal advice or legal services in connection with matters pertaining to the law.*

"The court said: 'We more readily reach this conclusion in view of the momentous importance of the question. Permitting corporations to practice law,

without any of the restraints imposed upon individuals, *who would not be licensed to practice law in or out of the courts* unless they possessed good moral character and the necessary legal learning, *will tend to commercialize, degrade, and prostitute the noble profession of the law.*' Boykin v. Hopkins (Ga. Sup.) 162 S. E. 796, 802. (Italics supplied).

"*The conclusion of that court that such acts of the proposed corporation would constitute the practice of law, speaking through Mr. Justice Hines as to 'what constitutes the practice of law in the absence of a statute,'* said:

* * *

Continuing, the Alabama Supreme Court said:

"(1) *It is unnecessary to observe, a fact of common knowledge, that it has been the usual business of a lawyer, for the past one hundred years in this state, as shown by the decisions we have cited, to engage in office practice not necessitating representation in court, as well as in cases needed in and about the collection and settlement of claims and demands.*

"(2) *The acts recited in the petition constituted the practicing of law as defined by the statutes relating to and defined in General Acts of 1931, p. 606. Such was the legislative intent, and is the construction placed by this court on the several statutes and the common law relating to and regulating the practice of law and the duty of an attorney to his client.*

* * *

"(3-6) *It is well established that the act in question (Gen. Acts 1931, p. 606) is a valid enactment under the police power, and offends neither state nor Federal Constitutions; is not usurpation of judicial power; does not deprive of liberty or property without due process; neither denies to citizens equal civil rights, nor grants special privileges and immunities; does not violate, impair, or deny rights retained by the people, and does not violate the Fourteenth Amendment to the Federal Constitution* (6 C. J. 569; McCaskell v. State, 53 Ala. 510; Brooks v. State, 88 Ala. 122, 6 So. 902 (Stone,

C. J.) ; In re Dorsey, 7 Port. 295, 388; Ex parte Wideman, 213 Ala. 170, 104 So. 440; Harris v. State ex rel. Wilson, Sol., 215 Ala. 56, 109 So. 291; Robinson v. State ex rel. James, 212 Ala. 459, 102 So. 693; Cummings v. State ex rel. Biggs, Solicitor, 214 Ala. 209, 106 So. 852) —*as applied to the facts of this case.*" (Emphasis supplied).

Under Proposition of Law II:

Constitution of Alabama of 1901, found in Code of Alabama 1940, Titles 1-6, Section 42, at page 88, reads as follows:

"DISTRIBUTION OF POWERS OF GOVERNMENT"

"Section 42. The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Section 43 at page 91, reads as follows:

"Section 43. In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judical powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

Section 139 at page 164, reads as follows:

"JUDICIAL DEPARTMENT"

"Section 139. The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts,

courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, and such persons as may be by law invested with powers of a judicial nature; but no court of general jurisdiction, at law or in equity, or both, shall hereafter be established in and for any one county having a population of less than twenty thousand, according to the next preceding federal census, and property assessed for taxation at a less valuation than three million five hundred thousand dollars."

Section 140 at page 166, reads as follows:

"Section 140. Except in cases otherwise directed in this constitution, the supreme court shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restriction and regulations, not repugnant to this Constitution, as may from time to time be prescribed by law, except where jurisdiction over appeals is vested in some inferior court, and made final therein; provided, that the supreme court shall have power to issue writs of injunction, habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions."

Said the Supreme Court of Alabama in the case of *Berk v. State ex rel Thompson, supra:*

"(1) *It is unnecessary to observe, a fact of common knowledge, that it has been the usual business of a lawyer, for the past one hundred years in this state, as shown by the decisions we have cited, to engage in office practice not necessitating representation in court, as well as in cases needed in and about the collection and settlement of claims and demands.*

"(2) *The acts recited in the petition constituted the practicing of law as defined by the statutes relating to and defined in General Acts of 1931, p. 606. Such was the legislative intent, and is the construction placed by*

this court on the several statutes and the common law relating to and regulating the practice of law and the duty of an attorney to his client.

* * *

"(3-6) *It is well established that the act in question (Gen. Acts 1931, p. 606) is a valid enactment under the police power, and offends neither state nor Federal Constitutions.*" (Emphasis supplied). *(Pages 836, 837 of 142 Southern Reporter).*

The Court of Appeals of Louisiana in *Meunier v. Bernich, supra,* held as shown by headnote 10, as follows:

"10. Attorney and client Key 1,

Constitutional law Key 52:

"Clause excepting, from statute defining practice of law, layman's activities without resort to court proceedings, in enforcing, securing, settling, adjusting, or compromising *defaulted, controverted, or disputed* accounts or claims, *held unconstitutional as impingement upon inherent power of judiciacy and as violate of express constitutional grant of jurisdiction to Supreme Court in all disbarment cases, but remainder of statute was valid legislation in aid of Supreme Court's inherent power* (Act No. 202 of 1932, Sec. 2 (b) (3); Const. 1921, art. 2, Sec. 2; art. 7, Sec. 10)."

The Court in this connection said:

"We further hold that Act No. 202 of 1932, with the elimination of the above quoted clause, is valid legislation for we construe the statute as passed in aid of the Supreme Court's inherent judicial power." (Emphasis supplied). (Pages 568, 578 of 170 Southern Reporter).

The Supreme Court of Alabama in *Williams vs. Knight, supra,* all the Justices concurring, said:

"(5) *This court has the right to make rules in the*

exercise of its inherent power; and rules so made can be regulated or modified in a proper case by the Legislature where the inherent power of this court is not limited." (Emphasis supplied).

The Supreme Court of Alabama in the case of *Bessemer Bar Association vs. Fitzpatrick, supra,* said:

"(1) *Statutes providing a penalty for the practice of law without a license are cumulative and do not deprive the court of its inherent power to punish for unauthorized practice by contempt proceedings in such courts that have jurisdiction in the matter.* Clark v. Reardon, 231 Mo. App. 666, 104 S. W. (2d) 407."

* * *

"(4) We are of the opinion that *the circuit court has the inherent power* to duly regulate its officers, agents and agencies in the practice of law before that court and in other courts over which it has superior judicial power. We have indicated this in recent decisions. *This power exists aside from that contained in the statutes and our recent decisions defining what constitutes the practice of law. We adhere to the decision rendered in Berk v. State ex rel. Thompson, 225 Ala. 324, 142 So. 832, 84 A. L. R. 740, defining the practice of law in and out of court.*" (Emphasis supplied). *(Pages 735, 738 of 196 Southern Reporter).*

The Supreme Court of Alabama in *Ex parte Thompson, supra,* held as shown by headnotes 1, 5 and 9:

"1. Constitutional law Key 12.

"In determining constitutionality of statute governing disbarment of attorneys, the several provisions of Constitution must be construed as standing in pari materia (Const. 1901, Sects. 11, 42, 139)."

* * *

"5. Attorney and client Key 32.

"Legislature held to have acted within constitutional bounds in creating board of commissioners of state bar and conferring powers on it (Const. 1901, Sec. 139; Code 1923, Secs. 3318, 6220-6239, as amended by Gen. Acts 1931, pp. 284, 683)."

* * *

"9. Attorney and client Key 57.

"Supreme Court may adopt findings and conclusions of board of commissioners of state bar, may alter or modify them, and they may take any action agreeable to its judgment in matter of disbarment." (Page 229 of 152 Southern Reporter).

The Supreme Court of Nebraska in the case of *Re Integration of Nebraska State Bar Association,* held as shown by all of the headnotes, as follows:

"Attorneys, Secs. 2, 32—Courts, Sec. 7—rules for integration of state bar—authority to promulgate.

"1. This court, having the inherent power to define and regulate the practice of law, has authority, in the exercise of a sound judicial discretion, to promulgate rules providing for the integration of the bar of the state.

"Constitutional Law, Sec. 57—distribution of governmental powers and functions—regulation of practice of law.

"2. The Constitution of this state does not, by express grant, vest the power to define and regulate the practice of law in any of the three departments of government.

"Constitutional Law, Sec. 57—regulation of practice of law—which department to exercise.

"3. In the absence of an express grant of this power to any one of the three departments, it must, when the occasion demands, be exercised by the department to which it naturally belongs.

"Courts, Sec. 4—inherent powers of.

"4. The term 'inherent power of the judiciary' means that power which is essential to the existence, dignity, and functions of the court from the very fact that it is a court."

"Attorneys, Sec. 32—inherent powers of court over.

"5. The supreme court of this state has the inherent power to regulate the conduct and qualifications of attorneys as officers of the court.

"Constitutional Law, Sec. 62—Courts, Sec. 4—powers of—administration of justice—matters obstructing or embarrassing.

"6. The proper administration of justice is the main business of a court, and whatever obstructs or embarrasses its chief function must naturally be under its control.

"Constitutional Law, Sec. 62—scope of judicial powers—regulation of practice of law.

"7. The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government." (Page 151 of 114 A. L. R.).

Of course, the Supreme Court of Alabama in its two decisions rendered in the case at bar—Wilkey et al v. State ex rel. Smith et al—as cited under Proposition of Law II, supra, has, in effect, ruled in harmony with the above quoted decisions, and within the purview of the quoted Sections of the Constitution of Alabama; and has, in effect, affirmed the correctness of Proposition of Law II, supra, viz:

"*The Supreme Court of Alabama*—the highest Court of the State—while in the exercise of the sovereign judicial power of the State under its Constitution, *has the inherent power to define and regulate the practice of law, both in and out of Court,* in said State; and which power may be aided, *but not impinged,* by a valid enactment of the Legislature under the 'police power'."

Petitioners erroneously insist that the Statute in question is to regulate the insurance adjustment business; whereas, it is an Act defining and regulating the practice of law, in which the insurance adjustment business is only an incident. Just here, the Petitioners approach the question at issue upon a false premise; and which makes the cases cited by Petitioners in Brief, as we will hereinafter point out, inapt on the question: Of the right of the Legislature of Alabama, in the exercise of its police power, to properly classify, upon reasonable basis, the independent business of Independent Insurance Adjusters—who are "Independent Contractors"—insofar as their business relates to acts constituting the practice of law!

The Supreme Court of Alabama in the case at bar has made this clear. We quote from paragraphs 7 and 9 in its opinion in this case, found on page 546 of 14 Southern Reporter, 2d Series, viz:

> " (7-9) *Subdivision (d)* of Section 42, Title 46, supra, *is not confined to insurance disputes but is broad enough to include them and should be so interpreted.* But as its language imports, it does not include the adjustment of insurance losses before there is a default, dispute or controversy. Before the situation reaches a point where there is a default, dispute or controversy, the law in our opinion provides for adjustments by independent lay adjusters, duly qualified and licensed as such, who may do whatever is necessary to that end *not prohibited by subdivisions (a), (b) and (c) of Section 42, Title 46, supra.* But after a default, dispute or controversy has arisen, the independent lay adjuster must step aside, for then the law declares that the further adjustment or litigation must be handled by a regularly licensed lawyer." (Emphasis supplied). Tr. of Rec. 225, 226.

Under Proposition of Law III:

This Proposition of Law reads as follows:

"As a 'Vocation,' Independent Insurance Adjusters, whether claimant adjusters or defense adjusters, are *'Independent Contractors,' and are not employees* 'in the ordi-

nary sense,' *nor are they 'in privity'* with either of the other parties, while settling legal claims or demands of or against insurance companies represented by them."

The Supreme Court of Alabama in the case of *Lynch Jewelry Co. v. Bass, supra,* held as shown by Headnote 1, as follows:

> "1. Master and servant Key 316 (1)—Collection agency *held to be independent contractor* for whose acts creditor was not liable.
>
> "Where creditor employed collection agency to collect purchase price of diamond ring, and servants of agency went to plaintiff and seized plaintiff's hands in an effort to take ring or to identify it *held collection agency was independent contractor in absence of special contract limiting its liability, for whose acts creditor was not liable.*"

Said the Supreme Court of Alabama in the case of *Collum Motor Co. v. Anderson, supra,* when dealing with a suit for damages for malicious prosecution of a garnishment, as follows:

> *"The Merchants' Credit Association was not the servant, agent, or employee, but an independent contractor, of defendant, for whose acts, as charged in this case, defendant was not responsible on the doctrine of respondeat superior.* Lynch Jewelry Co. v. Bass, 220 Ala. 96, 124 So. 222. Moreover, its liability in this form of action cannot under any circumstances be rested on such doctrine of respondeat superior, *but defendant must participate in the wrongful and malicious act, or ratify it with full knowledge, as we have shown.*" (Emphasis supplied). (Page 694 of 133 Southern Reporter).

Said the Supreme Court of Alabama in the case of *Milligan et al v. Alabama Fertilizer Co., supra,* as follows:

> "McCLELLAN, J. It appears to be well-settled law that, with respect to a claim placed in the hands of an attorney by a commercial agency such as that of R. G.

Dun & Co., for collection, the claim having been delivered to the agency by the creditor for the purpose of collection, the attorney is the agent of the collecting company, and not of the owner of the claim. Hoover v Wise, 91 U. S. 308; Bradstreet v. Everson, 72 Pa. St. 124; Lewis v. Peck, 10 Ala. 142; Stephens v. Badcock, 3 Barn. & Adol. 354. And it follows, of course, that, the attorney being thus the agent of the agent, *and not in privity with the principal,* the owner of the claim, cannot look to him for compensation of his services. Cleaves v. Stockwell, 33 Me. 341; Hill v. Morris, 15 Mo. App. 322." (Emphasis supplied). (Page 651 of 7 Southern Reporter).

The Supreme Court of Alabama, *on the first appeal in the case at bar,* held as shown by Headnote 4, as follows:

"4. Quo warranto Key 50 (1).

"In quo warranto proceedings charging respondents with practicing law without license, special plea of respondents that respondents were not employees of casualty and fire insurance companies 'in ordinary sense,' nor 'in privity' with such companies but were engaged in insurance adjustment business representing regular clientele, showed that their acts of settling claims for such companies constituted 'practice of law' prohibited by statute. Code 1923, Sec. 9932, par. 1; Gen. Acts 1931, p. 606.

"To be a 'privity' to another, a man must claim by or under that other, by blood, as heir, by representation, as executor, or by contract, as vendee, assignee, and the like." (Page 198 of 189 Southern Reporter).

Then, *on the last appeal in the case at bar,* the Supreme Court of Alabama held as shown by Headnote 3, as follows:

"3. Attorney and client Key 11.

"Independent insurance adjusters, who were paid on an hourly and mileage basis, were not 'employees' in the ordinary sense of insurance companies nor 'in privity' with such companies or liability carriers with-

in statute regulating the practice of law. Code 1940, Tit. 46, Sec. 42 (d)."

This headnote refers to the statement in the Court's opinion made *with reference to its holding on the first appeal,* as follows:

> "(3) We agree with the conclusion there reached that the appellants were not employees of the insurance companies which they represented 'in the ordinary sense' nor in privity with such companies and liability carriers." (Pages 536, 545 of 14 Southern Reporter, 2d Series). Tr. of Rec. 224.

There is a marked difference, *which is real, substantial, and not fanciful or artificial,* between the *nature of the business* of an "Independent Contractor" *as contrasted* with the *functioning* of an "employee in the ordinary sense," or one acting "in privity!" And, this difference and distinction are true, notwithstanding that the business activity of the one is similar to that engaged in by the other! *And, as such business activities relate to acts, which are properly declared to be the practice of law,* and, therefore, prohibited to be done by one not regularly licensed to practice law, the Legislature of a sovereign state is given the right, under the due exercise of its police power, to classify the "Independent Contractor" as one not entitled to engage in the act, *when constituting the practice of law!* The Independent Contractor's business is individual to himself in representing anyone and everyone, *whom he may "solicit"* or from whom he may otherwise acquire the right to represent that one about that one's own business, by contract express or implied; whereas, the business functioning of an "employee in the ordinary sense" is not at all about his own business, but is altogether about his master's business, and under the direct control and supervision of the master in the discharge of his duties under the employment; and the one "in privity" with another is still about his own business activities. With this reasonable differentiation kept in mind, when an Act defines and regulates the practice of law, it becomes easy and proper, then, to draw the line of demarcation, *as the Act in question does, when considering*

the publice welfare, between the right of an "employee in the ordinary sense" and one "in privity" to be permitted to do the act, which would otherwise be the practice of law as and when done by an "Independent Contractor," or by one as a "Vocation" for himself when representing the general public or anyone thereof in and about their dealings in business activities with third persons.

Under Proposition of Law IV:

The Supreme Court of Alabama, in the case at bar, held *on rehearing,* as shown by Headnotes, as follows:

> "27. Constitutional law Key 212.
>
> "The 'equal protection of the law' clause of the Fourteenth Amendment *does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wise scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.* U. S. C. A. Const. Amend. 14."
>
> "28. Constitutional law Key 211.
>
> "A classification having some reasonable basis does not offend against the 'equal protection of the law' clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. U. S. C. A. Const. Amend. 14."
>
> "29. Constitutional law Key 48.
>
> "When classification in a police law is called in question, if any state of facts can reasonably be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. U. S. C. A. Const. Amend. 14."
>
> "30. Constitutional law Key 48.
>
> "One who assails the classification in a police law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. U. S. C. A. Const. Amend. 14."

"31. Attorney and client Key 1, 11,

Constitutional law Key 238 (1):

"*Under the statute one who adjusts* a defaulted, controverted, or disputed account, claim, or demand *between persons with either of whom he is in privity or with whom he stands in the relation of employer and employee in the ordinary sense, is not engaged in 'practicing law,' and the statute so construed is not unconstitutional as depriving an independent insurance adjuster of 'equal protection of the laws.'* Code 1940, Tit. 46, Sec. 42 (d); U. S. C. A. Const. Amend. 14." (Emphasis supplied). (Page 538 of 14 Southern Reporter, 2d Series). Tr. of Rec. 230, 231.

The Supreme Court of Alabama, in the above-stated holdings, relies upon "the rules by which classification for the purpose of legislation must be tested," *as laid down by the Supreme Court of the United States in its opinion in the case of Lindsley vs. Natural Carbonic Gas Company, supra,* 220 U. S. 61, 31 S. Ct. 337, *55 L. ed. 369.*

The Supreme Court of Alabama, also, in support of its said holdings, by way of illustration, refers to the case of *Bryce vs. Gillespie, supra,* where it says:

"The Supreme Court of Appeals of Virginia in the case of *Bryce v. Gillespie, 160 Va. 137, 168 S. E. 653, applied these rules to a statute somewhat similar to the one here under consideration* and concluded that the act did not violate the equal protection clause of the 14th Amendment. *Though not committing ourselves to the soundness of the opinion of the Virginia court of the Bryce case in its entirety,* yet we refer thereto as concurring in the reasoning there employed upon the matter of discrimination. *In that view of the matter subdivision (d) of Sec. 42, Title 46, supra, is not unconstitutional as denying to the independent insurance adjuster equal protection of the laws guaranteed to him by the 14th Amendment to the Constitution of the United States.*

"*Application for rehearing overruled.*

"All the Justices concur." (Emphasis supplied). (Page 549 of 14 Southern Reporter, 2d Series). Tr. of Rec. 231.

We quote Headnote 2 in the case of *Bryce vs. Gillespie*, above referred to, from the Supreme Court of Appeals of Virginia:

"2. Attorney and client Key 1,

Constitutional law Key 238 (1):

"Act prohibiting persons, firms, or corporations, except attorneys at law, from representing another's claim in court, *unless having property interest in cause, with certain exceptions,* held not invalid as based on arbitrary and unreasonable classification (Acts 1924, c. 415; Const. Va. Secs. 1, 11; Const. U. S. Amend. 14).

"Acts 1924, c. 415, provides that, except duly licensed attorneys, no person, firm, or corporation, having no property interest in matter in controversy, shall represent another in any court; that no person, firm, or corporation shall assign to another any claim, or any interest therein, for the purpose of having such assignee represent the claim in any court; and that no person, firm, or corporation shall accept an assignment of any claim, of representing such claim in court. The act further provides *that any person, firm, or corporation may be represented by any employee who is engaged regularly on a salary basis,* and that any real estate agent may represent the landlord in claims for rent on property regularly listed with him." (Emphasis supplied). (Page 653 of 168 Southeastern Reporter).

Said that Court in its opinion, among other things, as follows:

"The attack on the constitutionality of the act is concentrated *on the distinction, or classification, which is made between an employer who pays his employee a salary and one who pays another commissions for*

services performed. In other words, it is claimed that there are two favored classes, i.e., an employer who pays an employee on a salary basis, and the employee thus paid: and two classes which are discriminated against, i.e., the employer who pays his employee a commission, or on a piece basis, and the employee so paid.

"The distinctions are more hypothetical than practical. All persons, whether employer or employee, have the same right to appear in any of the courts in their own behalf. The employer who pays his employee a salary has, *to a large extent, control of his activities, and* (Page 654) *may designate what duties he is to perform. Such employer has purchased the time of his employee during the hours of employment, and has a right, within limitations, to dispose of that time as he sees fit. An employer who pays a commission for services performed usually has no control over the time of such employee, or the hours of his employment.*

"If a traveling salesman is paid a commission on the sale of merchandise, or other commodity, *he has a property interest in all accounts due for the articles sold by him, and hence he has the same right to appear* before the courts to enforce the collection of such accounts *as any other interested party. Where different parties have a property right in the subject-matter of litigation, the act does not forbid any one of such parties from representing any or all other interested parties.*

"An employer who pays an employee by the piece has no legal right to control the time of such employee, except when working on the particular article for which he has agreed to pay him.

* * *

"No person has a legal right to control the time of another or direct how his time shall be used, unless he agrees, directly or indirectly, to pay the other therefor. *The statute provides that an employer who regularly pays for the use of another's time may be represented in the courts by such person for whose time he has paid, but that all other represeniations (with the ex-*

ception noted) in the courts of this commonwealth shall be by duly licensed and qualified attorneys.

* * *

"The right of a party to appear in his own behalf and he heard in the courts is fundamental. It is an inalienable right common to all, guaranteed both by the Constitution of the state and the Constitution of the United States. *The right to have some one else appear and speak for one, or the right of such other to appear in the courts as a representative of a litigant, is not an inalienable right. To represent another in the courts is not a right, but a privilege, to be granted and regulated by law for the protection of the public.*

"The act denies to no person, firm, or corporation the right to institute and conduct litigation by which said parties are personally affected or in which they have a property interest; it denies to no person, firm, or corporation the right to be represented by an employee regularly engaged and paid a salary;"

* * *

"no person, firm, or corporation is permitted to be represented before the courts by an employee temporarily engaged, whether such employee is paid a salary or otherwise. (Page 655).

"(1) It is a matter of common knowledge that in recent years there has developed a form of business designated collection agencies. *The tendency of some of these agencies is to engage in the practice of law.* That is, they not only advise creditors and claimants of their legal right, but frequently, especially in the inferior courts, appear for them. *The ethics of the legal profession prevent its members from soliciting business. There is no such restraint upon these collection agencies. On the contrary, they actively solicit claims for collection,* and numerous claims of doubtful value, stale demands, and debts barred by the statute of limitation are thus obtained by them. The owners have so little faith in the merits of these demands that they are unwilling to employ an attorney to institute action or to spend any of their own time or that of their paid employees to present these demands before the civil

justice, or other court. *Some of these collection agencies are willing to take a gambling chance, and institute and conduct proceedings thereon. Thus frequently litigations with little or no merit are instituted. The dockets of the courts are crowded with these stale demands, the time of the courts is unnecessarily expended thereon, and people of limited means who can little afford the expense of a lawsuit are unnecessarily harassed.*

"(2) No reasonable objection can be made to honest collection agencies which operate within legitimate bounds, but such agencies are usually composed of laymen who are not qualified to give legal advice or to conduct litigation in any of the courts. *The regulations in question were intended to confine the institution and conducting of litigation in the courts of record to interested parties, or skilled advocates for them, and to confine the institution and conducting of litigation in the inferior courts to interested parties or their regular agents, whose time and activities they have a legal right to control. By this act, the Legislature has to a large extent removed inducements for outside parties to stir up litigation. While in actual practice the regulations may in some instances result in hardship or inequality, we cannot say that they are arbitrary, or that the classification does not rest upon a reasonable basis.* (Emphasis supplied). (Page 656 of 168 Southeastern Reporter).

The Supreme Court of the United States in the case of *Stuart Lindsley vs. Natural Carbonic Gas Co. et al. supra,* held as shown by Headnotes 1, 2 and 3, *(Pages 369, 370 of 55 L. ed.),* as follows:

"Federal Courts—following decisions of state courts—Construction of statute.

"1. The construction placed by the highest court of the state upon N. Y. Laws 1908, Chap. 429, enacted to safeguard natural mineral springs against waste and impairment, must be accepted by the Federal Courts

in determining the validity of such statute under the Federal Constitution.

"Constitutional law—due process of law—prohibiting waste of mineral waters.

"2. A landowner engaged in collecting and vending as a separate commodity the carbonic acid gas contained in natural mineral waters existing in a common underground reservoir is not deprived of his property without due process of law, contrary to U. S. Const., 14th Amend., by the provisions of N. Y. Laws 1908, Chap. 429, which, as construed by the state courts, forbid him from pumping or otherwise artificially drawing, by means of wells on his property, unnatural quantities of such waters from the common source of supply, and wasting them to the injury or impairment of the rights of other proprietors.

"Constitutional law—*equal protection of the laws—Classification—prohibiting waste of mineral waters.*

"3. *The substantial difference in point of harmful result, which, so far as the case as made shows, may exist, affords a reasonable basis, under the equal-protection-of-the-laws clause of the Federal Constitution, for the exemption of pumping from wells not penetrating* the rock, and such pumping as is done for other purposes than collecting and vending, as a separate commodity, the carbonic acid gas contained in mineral waters, *from the operation of the provisions of N. Y. Laws 1908,* Chap. 429, *prohibiting the pumping or artificially drawing of unnatural quantities of mineral waters from a common underground source of supply, and wasting them to the injury and impairment of other proprietors.* (Emphasis supplied).

The Court's unanimous opinion, through Mr. Justice Van Devanter, decided March 13, 1911, among other things, says:

"In terms the bill (to enjoin the enforcement of a state statute) predicates the right to the relief sought *upon the claim that the state statute deprives the appellant and others* of property without due process of law, and denies to them the equal protection of the

laws, and therefore is violative of the 14th Amendment to the Constitution of the United States." (Emphasis supplied). (Page 371 of 55 L. ed.).

The Court in its opinion quoted as follows from its prior decision in a similar case, dealing with "gas and oil" in a commingled form in an underground common reservoir beneath the lands of many owners, of *Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576,* viz:

> " 'Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law * * * which is here attacked because it is asserted that it divested private property without due compensation, *in substance is a statute protecting private property, and preventing it from being taken by one of the common owners without regard to the enjoyment of the others.* * * * These contentions but state in a different form the matters already disposed of. *They really go not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the legislature of the state, we may not interfere'.*" (Page 376 of 55 L. ed.).

The Court then concluded its opinion in the said *Lindsley Case,* as follows:

> "What we have said upon the subject of classification sufficiently answers the suggestion or claim that, by reason of the presumption, the statute discriminates invidiously between different persons in substantially the same situation.
>
> "For these reasons none of the objections urged against the statute can be sustained, and so the decree dismissing the bill is affirmed." (Page 379 of 55 L. ed.).

The *right to practice law is a franchise* granted by the sovereign state, *and which cannot be acquired by usage or user,* or by the duration of a Statute of Limitation or by prescription; *because such unlawful exercise of a franchise*

is a "continuous usurpation!" (See: *In Re Tracy, 266 N. W. 88, (Minn. Supreme Court 1936); People v. Stanford, 77 Calif., 360, 18 Pac. 85.*

So, since lawyers, under rules of ethics or law, may be disbarred, if they solicit legal business, the Statute, as construed prohibiting Independent Insurance Adjusters, *after a dispute has arisen,* in adjusting a "defaulted, controverted or disputed" legal claim or demand, from further dealing with it to an attempted conclusion, while permitting "employees in the ordinary sense" of an insurance company to continue through a conclusion of the matter—*under the decisions of the Supreme Court of the United States noted in the Lindsley vs. Natural Carbonic Gas Company case, supra—would prevent the Independent Insurance Adjuster in his "vocation" from taking advantage of the common business with lawyers* "without regard to the enjoyment thereof by the lawyers *after the matter had reached the stage of practicing law,"* and who would otherwise be deprived of such common business, *when it reached the point of being the practice of law* to deal with it further, *by reason of its having been solicited by the Independent Insurance Adjuster before it had become the practice of law business* to further deal with it; *and for the public welfare,* it would prevent the Independent Insurance Adjuster layman from engaging in the practice of law, until first duly licensed so to do.

Said the Supreme Court of Alabama in the case at bar (Page 546 of 14 Southern Reporter, 2d Series), as follows:

> "When a dispute arises, it may take a wide range in the realm of the law and be governed by legal principles of a general sort, or it may be easily solved. And so may any disputed controversy. *But the law cannot separate and classify those which are disputed, controverted or defaulted into classes, some of which require the legal learning of a lawyer and some do not."*

(Emphasis supplied). Tr. of Rec. 226.

Wherefore, as a matter of argument, we repeat the statement of Proposition of Law IV, supra, viz:

"*The Statute of Alabama*—entitled: 'An Act to further regulate the practice of law; providing who may practice

law; defining the practice of law; requiring a license for practicing law; and providing penalties for violations of the Act.' (*Gen. Acts Ala. 1931, p. 606;* Codified in *Code Ala. 1940, Tit. 46, Section 42*)—as construed by the Supreme Court of Alabama *in the case at bar favorably* as to *'an employee in the ordinary sense,"* as against a *'Vocation'* of *'an Independent Insurance Adjuster,'* with respect to being engaged or not in *'practicing law'* within its provisions, *is a valid 'police law'* of said State *in aid of the Supreme Court:* and does not offend or violate the 14th Amendment to the Federal Constitution as depriving the 'Independent Insurance Adjuster' of 'equal protection of the laws,' or 'due process.'

"Because: as applied to the *'Vocation'* of the Petitioners as Independent Insurance Adjusters, viz: *'Independent Contractor,'* contrasted with *'employees in the ordinary sense'* of insurance company functioning within the purview of the Act, *defining and regulating the practice of law for the public welfare: 'the substantial difference in point of harmful result,* so far as the case as *made shown, may exist*—(when *'as soon as a controversy or dispute arises or a default occurs—any sort of controversy or dispute')—affords a reasonable basis, under the equal protection-of-the-laws clause of the Federal Constitution for exemption'* of the activity of the *'employee in the ordinary sense'* 'from the operation of the provisions' of the Legislative Act."

* * *

"(a) *The Petitioners* in their Brief, in the case at bar, *cite no authorities holding contrary to the foregoing proposition of law!"*

The following cases cited by Petitioners in Brief, in the case at bar, are without application to the case at bar and, therefore, are inapt!

We now discuss each of them in the order in which Petitioners refer to them in Brief:

First, on pages 57-59 of Petitioners' Brief is reference made to the case of *Hartford Steam Boiler Inspection and Insurance Company v. Harrison, 301 U. S. 459, 57 S. Ct. 838.* That case *deals with regulating* in the State of Georgia *insurance business merely, which is not a franchise as is the right to practice law;* and in the regulation of the com-

mon business permitted insurance companies to do, the court finds: That the Statute discriminates, without justice or fair reason, against one class to the advantage of the other class of insurance companies.

Said the Court:

> " 'We can discover no reasonable basis for permitting mutual insurance companies to act through salared resident employees and exclude stock companies from the same privilege'."

(See: The end of the quotation from the case appearing on page 59 of Petitioners' Brief).

Second, on pages 59 and 60 of Petitioners' Brief is reference made to the case of *State of Oklahoma ex rel Short v. Reidell, 109 Okla. 35; 233 Pac. 684; 42 A. L. R. 765.* That case deals with a Statute of the State of Oklahoma requiring all professional Accountants to become certified, according to the examination requirements under the Act, before engaging in the business, which the *Supreme Court of Oklahoma* says is the first and only such Statute of complete prohibition as to Public Accountants found within the United States; and says the Supreme Court of Oklahoma: *"The Defendants are not engaged in the exercise of a franchise, but a constitutionally guaranteed right."* (See: The end of the quotation from the case appearing on page 60 of Petitioners' Brief).

The Supreme Court of Oklahoma concedes, that the question involved was different to the right of a sovereign state to regulate the practice of law, which is a franchise right, and as the Supreme Court of Alabama had pointed out in the *Lehmann v. State Board of Public Accountancy, 208 Ala. 185, 94 So. 94, from which Alabama case the Suprame Court of Oklahoma quotes* in its opinion. We quote from the Oklahoma Supreme Court opinion on this subject:

> "As to the defendants' first contention, we deem it unnecessary to say more than that, after a careful consideration of the act as a whole, we think it was clearly the legislative intent to prohibit any one engaging in

the practice of the profession of accountancy who has not stood the examination and received the certificate as provided by that act.

"It is agreed by counsel that every state in the Union has a law regulating accountancy similar to the law of this state, with the exception that, at the time this action was commenced, no other state had attempted to prohibit the practice of the profession by those not certified.

"The validity of the statutes regulating accountancy has been upheld as being within the police power of the state by the courts of Alabama, Louisiana, New York and Texas. In all of the cases holding the act within the police power of the state, where its validity was questioned, the courts have particularly pointed out that the regulations did not prohibit one not holding the certificate to practice the profession of accountancy.

"*In Lehmann v. State Board of Public Accountancy, 208 Ala. 185, 94 So. 94, where the state board* of accountancy sought to cancel a certificate issued to one of its members, where it was held that the act was within the police power of the state and valid, the court said: '*The rights of complainant in this case are unlike the rights of a physician, surgeon, dentist, lawyer, or school teacher to practice their callings or professions.* Under the law, they cannot practice without a certificate or license; and, when their license or certificate is revoked, they are thereby prevented from practicing their profession at all. In the case of accountants, however, this is not true. They are not required to obtain a certificate or license to practice their calling, but obtaining the license or certificate is purely voluntary on their part. Nor does the revocation or cancellation of the license or certificate, when once issued, bar or deprive them from further or longer practicing their chosen calling. The license in their case is but a certificate of the board issuing it as to their competency and fitness. It is not at all a requisite to the practice of their calling, though it may be true, and doubtless is, that the certificate or license, being an authoritative recommendation or certification of a legally con-

stituted board as to efficiency and qualifications, has some value'." (Emphasis supplied). (Pages 768 and 769 of 42 A. L. R.).

Third, on page 61 of Petitioners' Brief is reference made to and quotation set forth from the opinion in the case of *Allgeyer vs. State of Louisiana, 165 U. S. 590, 41 L. ed. 832.* The opinion in that case, in dealing with the constitutional right of a citizen of one state to contract for insurance protection under contract made with an insurance company of and in another state, but not authorized to do business in the state where that citizen resided, had occasion to set forth a quotation from the opinion of Mr. Justice Bradley in another case dealing with "the right to follow any of the ordinary callings of life" as guaranteed by the Federal Constitution. *That case does not deal with a franchise regulation, such as is the right to practice law and as is involved in the case at bar!*

Fourth, on page 63 of Petitioners' Brief is reference made to the case: *New State Ice Co. vs. Liebman, 285 U. S. 262, 52 S. Ct. 371.* That case deals with "the common right to engage in a lawful private business, such as the manufacture and sale of ice." *That case does not deal with a franchise regulation, such as is the right to practice law and as is involved in the case at bar!*

POINT B

Subdivision (d) of Section 42, Title 46, Code of Alabama of 1940, as construed by the Supreme Court of Alabama, recognizing that the adjustment of "defaulted, controverted, or disputed" claims is a legitimate *functioning* in which an "employee in the ordinary sense" may engage, without being licensed to practice law, but denies that right to an "Independent Insurance Adjuster"—as an Independent Contractor—whether paid by the hour or by the piece work, *does not* deprive Petitioners and other "Independent Insurance Adjusters"—as Independent Contractors—of liberty and property without due process of law.

We respectfully submit, that the foregoing part of this our Brief, and with the authorities cited supporting the same, suffices to maintain the correctness of this point!

The Alabama Statute defining, regulating and licensing the practice of law, and as construed by the Supreme Court of Alabama in the case at bar, prohibits a "Vocation" of an "Independent Contractor" in the settlement and adjustment of "defaulted, controverted or disputed" accounts, claims or demands for or against third persons, unless that "Vocation" be engaged in by an "Individual Person" duly licensed to practice law, *since such activity constitutes the practice of law;* and *it makes no difference whether that "Independent Contractor" be retained on a salary or paid by the hour, or by the piece work!*

Petitioners in Brief, on page 63 say: "We urge that the State has no right to destroy the well-recognized vocation of Independent Insurance Adjuster."

The Supreme Court of Alabama in construing the Act defining and regulating the practice of law, as said, *has not* permitted the destruction of the "alleged" well-recognized vocation of the "Independent Insurance Adjuster!" It has, merely, properly regulated it, *as an incident to the State's right to define and regulate the practice of law for the public welfare;* and has thereby properly required the "Independent Insurance Adjuster"—as an Independent Contractor—*"to operate within legitimate bounds,"* and *not be allowed to practice law unlawfully!*

Pertinent to this statement, we quote from the Supreme Court of Appeals of Virginia in *Bryce vs. Gillespie, supra,* on page 656 of 168 S. E. Reporter: *"No reasonable objection can be made to honest collection agencies which operate within legitimate bounds. * * * The tendency of some of these agencies is to engage in the practice of law."*

Wherefore, we most respectfully submit, that this case at bar does not involve vital rights of Petitioners calling for the Writ of Certiorari; but that all vital rights of the Petitioners have been safeguarded and protected by the Statute of Alabama and its Supreme Court's construction thereof, in defining and regulating the practice of law, *which is a franchise right!*

No rights of the Petitioners guaranteed by the United States Constitution have been denied thereby; and for that reason, the Petition in the case at bar, for the Writ of Certiorari to the Supreme Court of Alabama, we most respect-

fully submit, is not entitled to be allowed; and that, in no event, should the Writ of Certiorari be granted by this Honorable Court, as prayed for by the Petitioners!

Most respectfully submitted,

William Marvin Woodall

WILLIAM MARVIN WOODALL,

Francis H. Hare

FRANCIS H. HARE,
Counsel for Respondents.

Post Office Address of Counsel for Respondents:
Mr. Woodall: 702 First National Building,
Mr. Hare: 1207 Comer Building,
Birmingham, Alabama.

STATE OF ALABAMA
JEFFERSON COUNTY

This is to certify, that I have served a copy of the foregoing OPPOSING BRIEF upon Honorable James A. Simpson, Counsel for Petitioners, at his office in the City of Birmingham, Alabama, on this the 26 day of October, 1943.

William Marvin Woodall

WILLIAM MARVIN WOODALL,
Of Counsel for Respondents.

Subscribed and sworn to before me, and given under my hand and official seal this the 26 day of October, 1943.

Jennye Van Leuven

Notary Public.

No. 400

IN THE

Supreme Court of the United States

OCTOBER TERM 1943. No. 400.

J. L. WILKEY, *et al.*,
Petitioners,

vs.

STATE OF ALABAMA, *et al.*,
Respondents.

PETITION FOR PERMISSION TO FILE A BRIEF *AMICUS CURIAE.*

To the Honorable the Justices of the Supreme Court of the United States:

CONOVER ENGLISH, a member of the Bar of this Court, comes and shows the Court the following facts:

1. The petitioners are BENJAMIN P. BURMAN and VINCENT SCULLY, partners in trade as STANDARD CLAIMS ADJUSTMENT SERVICE. Petitioners operate and carry on their business as what is known in insurance circles as independent adjusters. Petitioners are laymen, and are not members of the Bar of any State.

2. Petitioners act as independent adjusters for various insurance companies having offices in and carrying on business in the State of New Jersey. As such independent

adjusters petitioners investigate, adjust and settle claims of various kinds which are made against the various insurance companies for which they act. Petitioners are not paid a fixed salary by any of the said insurance companies, but are otherwise compensated for their services.

3. Petitioners are of the opinion that the decision of the Supreme Court of Alabama, as reported in 14 Southern Reporter (2d) 536, will materially interfere with their business, which they believe to be a legitimate business, and is in contravention of their rights under the Constitution of the United States, and particularly the Fourteenth Amendment thereof, and petitioners desire to file a brief as *amicus curiae* in this matter with this Court.

4. Petitioners are advised by James A. Simpson, Esquire, counsel for J. L. Wilkey and J. L. Wilkey Adjuster, Inc., the petitioners in the above entitled suit, that his permission has been obtained for such filing, but that counsel for the respondents in the above entitled suit, although requested so to do, have refused to grant such permission.

WHEREFORE, petitioners respectfully request this Court for leave to file such brief as *amicus curiae* on the petition of the petitioners in the above entitled suit for the granting of a writ of certiorari.

Respectfully submitted,

CONOVER ENGLISH.

Dated November 9, 1943.

I HEREBY CERTIFY that a copy of the foregoing Petition was mailed to Marvin Woodall, Esq., attorney for respondents, by airmail special delivery this November 9, 1943.

CONOVER ENGLISH.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.
(5585)